TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 924

ARSENAL BUILDING CORPORATION AND SPEAR & CO., INC., PETITIONERS,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 5, 1942.

CERTIORARI GRANTED MARCH 2, 1942.

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United States Circuit Court of Appeals for the Second Circuit

PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF-APPELLANT

v.

ARSENAL BUILDING CORPORATION AND SPEAR & CO., INC., DEFENDANTS-APPELLEES

Statement under Rule 13, Subdivision 4

1. The above-entitled suit was commenced on March 21, 1940.

2. The name of the plaintiff is Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, and the names of the defendants are Arsenal Building Corporation and Spear & Co., Inc., and there has been no change of parties.

3. The complaint herein was filed March 21, 1940; the answer herein was filed April 13, 1940, the amended complaint herein was filed March 31, 1941; and the amended answer herein was filed March 7, 1941. The defendants have not been arrested, nor was bail taken or property attached or arrested.

4. This trial was had on March 31, 1941, and April 1, 2, 3, and 4, 1941, and the judge who heard the trial, without jury, was the Hon. John M. Woolsey, United States District Judge.

5. No question was referred to a commissioner or commissioners, master or referee.

6. Final judgment was rendered herein on April 21, 1941. The appeal herein was taken on May 5, 1941.

401225—41——1

[CAPTION]

District Court of the United States for the Southern District of New York

Civil Action File No. 8–68

PHILIP B. FLEMING, ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF

v.

ARSENAL BUILDING CORPORATION AND SPEAR & CO., INC., DEFENDANTS

Summons

To the above named DEFENDANT:

You are hereby summoned and required to serve upon Irving Rozen, plaintiff's attorney, whose address Wage and Hour Division, United States Department of Labor, Federal Building, 641 Washington Street, New York, New York, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[SEAL] GEORGE J. H. FOLLMER,
Clerk of Court.

Date: March 21, 1940.

NOTE.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

Amended complaint

I

Plaintiff brings this action to enjoin defendants from violating the provisions of Section 15(a)(2) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060, U. S. C., Title 29, Sec. 201, et seq.), hereinafter called the Act.

II

Jurisdiction of this action is conferred upon the Court by Section 17 of the Act.

III

Defendants are, and at all times hereinafter mentioned were, corporations organized and existing by virtue of the laws of the State of New York, having their principal places of business at 225 Fifth Avenue, in the City, County, and State of New York, within the jurisdiction of this Court.

IV

Arsenal Building Corporation is, and at all times hereinafter mentioned was, the owner of a twenty-two (22) story and basement loft building located at 463 Seventh Avenue, New York, New York. Defendant, Spear & Company, Inc., during all times hereinafter mentioned, has acted and is acting as the agent of defendant, Arsenal Building Corporation, in the management and operation of said building.

V

With the exception of a retail clothing store, a barber shop, and a cigar stand, the space in said building is and has been leased to approximately forty-two (42) tenants, approximately forty (40) of which have been and are engaged in the production, sale, and distribution of ladies' garments, and approximately two (2) of which have been and are engaged in the selling of silks, rayons, supplies, and printed materials at wholesale to manufacturers, wholesalers, and contractors in the ladies' garment industry. Substantially all of the materials from which such goods have been and are produced have been and are purchased, transported, and received in interstate commerce from and through states other than the State of New York, and substantially all of the goods produced by said tenants have been and are being produced for interstate commerce and have been and are being sold, transported, shipped, and delivered in interstate commerce from said building, in the State of New York to, into, and through states other than the State of New York. Substantial quantities of the silks, rayons, supplies, and printed materials aforesaid have been and are purchased, transported, and received in interstate commerce from and through states other than the State of New York, and substantial quantities of such goods have been and are being sold, transported, shipped, and delivered in interstate commerce from said building in the State of New York to, into, and through states other than the State of New York. The said forty (40)

tenants engaged in producing ladies' garments, and the said two (2) tenants engaged in selling silks, are therefore engaged in interstate commerce, as aforesaid.

VI

At all times hereinafter mentioned, defendants have employed approximately twenty-nine (29) employees in and about said building who are engaged in interstate commerce, as aforesaid, and in the production of said goods for interstate commerce, or in processes or occupations necessary to the production thereof.

VII

During all times hereinafter mentioned, defendant, Spear & Company, Inc., as agent for, and for the account of, defendant, Arsenal Building Corporation, had and has the control, direction, and supervision of such employees. By so doing, defendant, Spear & Company, Inc., has acted and is acting in the interest of defendant, Arsenal Building Corporation, in relation to such employees.

VIII

During the period beginning October 24, 1938, the effective date of Section 7(a)(1) of the Act, and continuously through October 23, 1939, defendants employed the aforesaid employees, who were engaged in interstate commerce, and in the production of goods for interstate commerce, as aforesaid, for workweeks longer than forty-four (44) hours, and did fail and refuse to compensate the said employees for their employment in excess of forty-four (44) hours in such workweeks at rates not less than one and one-half times the regular rates at which they were employed, and, in fact, did fail and refuse to compensate them for such excess hours at any rates greater than the regular rates at which they were employed; and, during the period beginning October 24, 1939, the effective date of Section 7(a)(2) of the Act, and continuously to the date hereof, defendants have employed the aforesaid employees who were engaged in interstate commerce, and in the production of goods for interstate commerce, as aforesaid, for workweeks longer than forty-two (42) hours, and have failed and refused to compensate the said employees for their employment in excess of forty-two (42) hours in such workweeks at rates not less than one and one-half times the regular rates at which they were employed, and, in fact, have failed and refused to compensate them for such excess hours at any rates greater than the regular rates at which they were employed.

By employing the said employees for workweeks in excess of the said hours during the said periods without compensating them for their employment in excess of the said hours in such workweeks at rates not less than one and one-half times the regular rates at which they were employed, defendants have violated and are violating the provisions of Sections 7 and 15(a)(2) of the Act.

IX

The goods produced and sold by said tenants, as aforesaid, compete with similar goods produced and sold in other states and said tenants in their said businesses compete with manufacturer of ladies' garments and with persons selling silks, rayons, supplies, and printed materials at wholesale, as aforesaid, located in other states.

X

Defendants have, since the effective date thereof, continuously violated the aforesaid provisions of the Act and threaten and intend to continue to violate the said provisions unless enjoined and restrained by a judgment of this Court.

XI

A judgment enjoining and restraining the violation hereinabove alleged is specifically authorized by Section 17 of the Act.

Wherefore, plaintiff demands judgment enjoining and restraining defendants, their officers, agents, servants, employees, and attorneys, and all persons acting or claiming to act in their behalf and interest, from violating the provisions of Section 15(a)(2) of the Act, both permanently and during the pendency of this action, and such other and further relief as may be necessary and appropriate.

GERARD D. REILLY,
Solicitor,
IRVING J. LEVY,
Assistant Solicitor in Charge of Litigation,
ARTHUR E. REYMAN,
Acting Regional Attorney,
IRVING ROZEN,
Senior Attorney,
United States Department of Labor,
Attorneys for Plaintiff.

Post Office Address: Wage and Hour Division, United States Department of Labor, 341 Ninth Avenue, New York, New York.

[CAPTION]

Amended answer

The defendants, Arsenal Building Corporation and Spear & Company, Inc., for their answer to the amended complaint in the above-entitled cause, respectfully allege:

1. Deny each and every allegation in Paragraph II of the amended complaint.

2. Admit the allegations in Paragraph III of the amended complaint.

3. Admit the allegations in Paragraph IV of the amended complaint.

4. Admit the allegations in Paragraph V of the amended complaint except deny that said tenants engaged in producing ladies' garments and said tenants engaged in selling silks are engaged in interstate commerce.

5. Deny each and every allegation in Paragraph VI of the amended complaint, except that defendants admit that defendant Arsenal Building Corporation from time to time employed approximately twenty-eight (28) employees in and about said building at the times mentioned in the amended complaint.

6. Admit the allegations in Paragraph VII of the amended complaint.

7. Deny each and every allegation in Paragraph VIII of the amended complaint, except as and in so far as any such allegation is or may be admitted in paragraphs 13 to 20 inclusive of this answer and as to such allegations, admit and allege them.

8. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph IX of the amended complaint.

9. Deny each and every allegation in Paragraph X of the amended complaint.

10. Deny each and every allegation in Paragraph XI of the amended complaint.

FIRST DEFENSE

11. The amended complaint fails to state a claim against the defendants or either of them upon which relief can be granted.

SECOND DEFENSE

12. That the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; U. S. C., Title 29, Sec. 201 et seq.), in so far as it may be held applicable to the defend-

ants, Arsenal Building Corporation and Spear & Company, Inc., and to the said employees of defendant Arsenal Building Corporation, employed in connection with the operation of the premises described in the amended complaint, is unconstitutional as contravening Articles V and X of the amendments to the Federal Constitution and as not within the power delegated to the Congress by Article I, Section 8, Clause 3 thereof, or by any other provision of the said Constitution or any amendment thereto.

THIRD DEFENSE—SEPARATE AND PARTIAL

13. That on or about February 19, 1936, defendant, Arsenal Building Corporation, through an employers' association of which it was and is a member, duly entered into a certain agreement in writing with a labor union representing the employees of said defendant, Arsenal Building Corporation, approximately 28 in number, employed in connection with the operation of the premises described in the complaint, which said agreement, together with certain written modifications thereof, was in full force and effect to and including January 31, 1939. Reference to said written agreement and written modifications thereto is made with the same force and effect as though they were herein set forth in full, and the same will be produced upon the trial of this action.

14. That said agreement in writing provided a schedule of minimum wages, a schedule of maximum hours, and other terms and conditions of employment applicable to said employees of defendant Arsenal Building Corporation, that among other things, the said agreement provided a maximum of weekly hours of employment for certain classes of employees of forty-eight (48) hours per week, and for certain other classes of employees of seventy-two (72) hours per week, and that the said agreement provided certain specified holidays.

15. That said agreement in writing further provided that all hours worked in excess of said forty-eight (48) hours per week, or seventy-two (72) hours per week, respectively, or on any of the several holidays specified therein, should be compensated for at the rate of time and one-half of the regular rate of pay.

16. That said agreement in writing by amendment effective February 1, 1938, further provided for certain classes of employees a maximum workweek of sixty (60) hours in place and instead of the previously effective maximum workweek of seventy-two (72) hours per week.

17. That from October 24, 1938, to and including January 31, 1939, the said employees of the defendant Arsenal Building Corporation were compensated for any and all hours worked in excess of forty-eight (48) hours per week, or sixty (60) hours per week, respectively, and for any and all hours worked on any of the specified holidays, at rates not less than one and one-half times the regular rates at which they were employed.

18. That on or about February 4, 1939, defendant Arsenal Building Corporation, through an employers' association of which it was and is a member, duly entered into a certain agreement in writing with a labor union representing the employees of said defendant Arsenal Building Corporation, approximately [redacted] in number, employed in connection with the operation of the premises described in the amended complaint, which said agreement is and will remain in full force and effect to and including February 3, 1942. Reference to said written agreement is made with the same force and effect as though it were herein set forth in full, and the same will be produced upon the trial of this action.

19. That said agreement in writing provides a schedule of minimum wages, a schedule of maximum hours, and other terms and conditions of employment applicable to the employees of said defendant Arsenal Building Corporation, that, among other things, the said agreement provides for certain classes of employees a maximum workweek of forty-seven (47) hours per week for the period from February 4, 1939, to and including August 3, 1940, and a maximum workweek of forty-six (46) hours per week for the period from August 4, 1940, to and including February 3, 1942, that for certain other classes of employees, the said agreement provides a maximum workweek of fifty-nine (59) hours per week for the period from February 4, 1939, to and including August 3, 1940, and a maximum workweek of fifty-eight (58) hours per week for the period from August 4, 1940, to and including February 3, 1942, and that the said agreement provides certain specified holidays.

20. That from February 4, 1939, to and including the date of the commencement of this action, the said employees of the defendant Arsenal Building Corporation were compensated for any and all hours worked in excess of forty-seven (47) hours per week, or fifty-nine (59) hours per week, respectively, and for any and all hours worked on any of the specified holidays, at rates not less than one and one-half times the regular rates at which they were employed.

Wherefore, defendants pray judgment that the amended complaint of the plaintiff be dismissed with costs to the defendants.

Dated: March 4, 1941.

McLANAHAN, MERRITT & INGRAHAM,
Attorneys for Defendants,
Office and P. O. Address, 40 Wall Street,
Borough of Manhattan, City of New York.
By WALTER GORDON MERRITT.

KENNETH C. NEWMAN,
Associate Counsel,
Office and P. O. Address, 12 East 41st Street, New York, N. Y.

[CAPTION]

Before Hon. JOHN C. KNOX, District Judge

NEW YORK, *February 28, 1941, 11:30 a. m.*

Appearances: Gerard D. Reilly, Esq., Solicitor; Irving J. Levy, Esq., Assistant Solicitor in Charge of Litigation; Arthur E. Reyman, Esq., Acting Regional Attorney; Irving Rozen, Esq., Senior Attorney, for the Plaintiff. McLanahan, Merritt & Ingraham, Esqrs., Attorneys for Defendants; Henry Clifton, Jr., Esq., of Counsel.

Mr. ROZEN. Your Honor, this is an action for an injunction under Section 17 of the Wage and Hour Act, sometimes called the Fair Labor Standards Act.

The plaintiff is now General Fleming, who is Administrator of the Wage and Hour Division.

The complaint alleges that the defendant Arsenal Building Corporation is the owner and Spear & Company, Inc., is the agent of a 22-loft building on 463 Seventh Avenue, which is the corner of 35th Street, in the heart of the Garment Center district in New York City.

It alleges, too, that the defendants employ approximately 29 employees, elevator men, freight-elevator men, passenger-elevator men, firemen, porters, handymen, and electricians.

In that building, as your Honor probably is aware, are contained tenants who engage solely in manufacture and production and distribution of dresses.

The complaint alleges that the tenants are engaged in the production of goods for commerce, or in processes or occupations necessary for the production of goods for commerce,

and those allegations in the complaint are admitted in toto by the answer.

We claim in our complaint further that these 29 maintenance employees are likewise necessary to the production of goods for commerce, or are engaged in occupations or processes necessary to the production of goods for commerce, and that they are therefore covered by the Act.

As a matter of fact, we are amending our complaint. I do not know whether this is the appropriate time to do so, to allege that the maintenance employees are engaged in commerce. May I do that at this time, too, your Honor?

The COURT. Any objection?

Mr. CLIFTON. Mr. Rozen called me, your Honor, the other day and said that if I thought it better, he would so move, and I asked him if he would because of the fact that we have associate counsel with whom we are not so very closely in touch. I also indicated that if he would move formally, I probably would not oppose.

The COURT. Do you object to my entering an order here with the direction that he has the right to so amend?

Mr. CLIFTON. If you care to, your Honor.

Mr. ROZEN. So I say our complaint in amended form will allege that the maintenance employees are engaged in commerce and the production of goods for commerce. And the reason why we use the two phrases, your Honor, is because our Act—your Honor may desire to look at it—in the substantive section, Sections 6 and 7, which establish the minimum wages and the maximum hours, provides that every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce, certain specified wages. And likewise Section 7 provides that no employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce, or in the production of goods for commerce, more than a certain number of hours without paying time and a half for overtime.

October 24, 1938, was the inception of this Act. The hours at that time were 44 hours, and the minimum rate was 25 cents. On October 24, 1939, the hours were decreased to 42. On October 24, 1940, they were decreased to 40 hours. So, at the present time, you have to pay people in your employ overtime wages, time and a half, after 40 hours, and 30 cents an hour, the minimum rate.

But we contend that these maintenance employees are engaged in commerce, or the production of goods for commerce, or in processes or occupations necessary to the production of

goods for commerce. We say, your Honor, that these freight-elevator employees, for example, who transport all the raw materials into the tenant's premises and who transport all the finished goods out of the tenant's premises, are right within the stream of commerce, because the raw materials are delivered to the tenants, not downstairs at the freight-elevator entrance, or the loading platform, but taken up by the truckman, or whoever he may be, or the messenger boy delivers the raw materials right into the tenant's premises; and not until they get into the tenant's door or the tenth or eleventh floor, as the case may be, does interstate commerce cease; and likewise on the way out.

The COURT. I understand that.

Mr. ROZEN. That is on the interstate commerce feature, your Honor. Now on the production of goods, we maintain that the tenants who are producing millions of dollars worth of commerce, and are employing thousands of employees, could not function and could not do business and could not produce their goods unless the firemen in the cellar provided them with heat; unless the electricians took care of the electric wires; unless the freight-elevator men functioned, and unless the passenger-elevator men functioned. It is the same situation, your Honor, as if you had a manufacturer located in some small community, perhaps, who had the entire building, four or five floors, and owned it. There would not be any question in anybody's mind that in a case like that, that the employees are engaged in commerce or the production of goods for commerce, or in processes or occupations necessary for the production of goods for commerce.

The COURT. Well, that being the contention, what is it you want to do now?

Mr. ROZEN. Well, your Honor has done some things for me already. We have amended the complaint. A case like this, your Honor, can take a long time, or it can take a short time. With 44 tenants in the building and thousands of employees, and 29 maintenance employees, if counsel on the other side and ourselves too, for that matter, were not careful, the case could be protracted to enormous length.

The COURT. Oh, yes.

Mr. ROZEN. So we have made a very determined effort, your Honor, to save the time of the Court and our own time, and save inconvenience of the tenants——

The COURT. Can you concede any of these facts?

Mr. ROZEN. Some of the facts we have asked the defendant to concede, and some he has already conceded, but some he

finds himself unable to do. I think that many of them, if your Honor would listen to them, would be helpful.

Now in a case like this, the important thing—I might say, your Honor, that this is one of the first cases of this kind, and we are quite certain that the case will get to the Supreme Court of the United States, because it involves a very important principle, as your Honor can see, and a wide field of employees throughout the country; and under these circumstances not only do we want to conserve the time of the Court, but on the other hand, we want to be sure that we have a full and complete record so that the Supreme Court of the United States can have ample facts to determine what the result shall be. So we are in that dilemma, your Honor.

So, after mature consideration and deliberation, we have come to the conclusion that the way we have got to show the Court—even the District Court; it is an important court, of course, too—the actual facts, is to get from the tenants of the building answers to a brief questionnaire which we are going to prepare. Those questions will be chiefly as to the amount of their business, the amount of business that is done interstate, the number of employees they have, the pay rolls that they have, the number of dresses that they manufacture, the amount of raw materials that they get; seven or eight questions of that nature from all the tenants to be answered so that we may have that in the record. And then in addition to that, to be absolutely sure that we have got a real picture of how this building operates, and the manner in which maintenance employees help it operate, and the manner in which maintenance employees are essential, I think we must show that by submitting at least perhaps ten, or perhaps less, of the tenants in the building, to get them here to testify as to the manner of the operations. I think in that way we will be able to cut down the time of trial tremendously; but that is something as to which we have got to have the cooperation of the defendants, because otherwise it means we have got to subpoena each tenant, which we want very badly to avoid. I think if the defendant cooperated with us——

The COURT. I assume the defendants would be glad to cooperate?

Mr. CLIFTON. Well, there is just this about it, your Honor: last Fall, after answer had been filed and issue joined in this case, Mr. Rozen's department issued quite a few subpoenas to the tenants to appear and testify before an examiner of the Wage and Hour Division at hearings which we were not permitted to attend. We unsuccessfully sought to preserve our rights to appear at those hearings before the District

Court here, and the right was denied. We, since that time, have assumed that in his investigation of the affairs of the tenants he got all the information which he now appears not to have.

Nevertheless, when Mr. Rozen wrote us and called us on the phone the other day, we again approached the tenants and asked them if they would give us the information so we might tabulate it for him; and they, not being connected with the defendants in any way, financially or otherwise, told us that they would not give us any information; that it was not any of our business; and I cannot say that I blame them. The landlords are not ordinarily supposed to be interested in the amount of garments the tenants produce, or their gross business or anything of that sort. So although we tried to make the effort, we were unsuccessful; and I am afraid we cannot supply this information from tenants. If, however, Mr. Rozen can get it, and wishes us to agree that it is a fact, without our having to concede the materiality of any particular fact, we would be glad to do so.

Mr. ROZEN. Well, what I can do, of course, your Honor, is to prepare the questionnaire I referred to, and go to the tenants ourselves and explain to them that it is in an effort to save their time and convenience if they cooperate with us.

The COURT. All right, then let the defendant have the answers to these questionnaires and he will concede them without admitting the materiality or relevancy.

Mr. ROZEN. There won't be any question about authenticity?

The COURT. That is right.

Mr. ROZEN. I think that could be worked out satisfactorily, provided, of course, we have the right, as we unquestionably do, to submit some of the tenants.

Now, your Honor, in this case the defendant has raised certain defenses——

Mr. CLIFTON. Are you passing from the facts?

Mr. ROZEN. Well, I have got certain things listed here. I would like to go in that order so I won't miss any of them.

Mr. CLIFTON. Well, just on the question of facts, there is just one other thing I would like to call the Court's attention to. Mr. Rozen also asked us to furnish him information which was purely within our knowledge. We wrote him under date of February 26th, stating we would produce that information in advance of the trial, but we would like an understanding with him that if we did, it would be for the purpose of shortening the trial, and that he would not seek to prove independently and all over again the facts which

we were willing to concede. We asked him to reply, and to date we have had no reply. I wonder if he cares to answer now.

Mr. ROZEN. Of course, your Honor, any information that the defendant supplies us with will be used to the best advantage; and as I stated to your Honor, we are going to try to shorten this trial as much as we possibly can, and it is silly to ask an opposing counsel—pardon me, Mr. Clifton, for using that word—but anyway, we are going to try to shorten the trial as much as we possibly can.

The other request is whether we are going to object to the authenticity of the documents supplied——

The COURT. What are these documents?

Mr. ROZEN. I am glad your Honor asked that question, because we would like to have it in the record, because Mr. Clifton has agreed. This will save a great deal of time in this case. It is an exact transcript of the actual pay rolls of the maintenance employees from October 24, 1938, to the date of trial. And on that I also asked Mr. Clifton to let me have the names of the employees and their positions which they occupy. I assume that will appear on the pay roll?

Mr. CLIFTON. Yes.

Mr. ROZEN. That will be satisfactory, your Honor. Mr. Clifton also states in his letter that he will furnish us with available copies of the leases of the tenants.

Mr. CLIFTON. What I meant is that we would have them available.

Mr. ROZEN. That means all copies of all leases, I assume?

Mr. CLIFTON. Yes.

Mr. ROZEN. Your Honor, Mr. Clifton also stated that he had the actual rent bills and other bills rendered to the tenants for the last few months, showing charges for electricity, and so forth.

I think, Mr. Clifton, I would like to have the bills for the last six months showing not only electricity but also water——

Mr. CLIFTON. No water.

Mr. ROZEN. Some of the tenants, I believe, do pay for water?

Mr. CLIFTON. I say none.

Mr. ROZEN. In the past, at any rate, a year or so ago, there were cases where tenants paid for water. I have seen rent bills that showed that.

Mr. CLIFTON. Apparently that is not so.

Mr. ROZEN. I would like to have the fact, if it is, when that practice ceased, if that is the fact, and for a period of six months prior to the cessation of the practice, to show the amount of water bills paid by the tenants; and any other

charges that there might be to the tenants by the landlord for any other services that we are not aware of at the present time. And also a tabulation showing the stock ownership of each defendant, as well as the officers and directors of each defendant.

Mr. CLIFTON. I do not see, your Honor, in any of those cases that it is going to be necessary for Mr. Rozen to make any extended independent check.

Mr. ROZEN. I do not think it will, either. I am sure we can rely on the authenticity of the documents furnished by Mr. Clifton.

The COURT. All right.

Mr. ROZEN. Your Honor, we have joined in this action the defendant Spear & Company because Spear & Company was the managing agent of the building, and the allegations with respect to Spear & Company were virtually admitted; so that under our Act, Section 3(d), Spear & Company, I think, would be conceded by defendant to be the employer of these employees, at least for the purpose of this injunction. I think it would be very helpful in the trial, and would shorten it considerably, if the defendants would concede that fact, so that we could eliminate that point from consideration. Of course you need testimony otherwise to prove those facts.

Mr. CLIFTON. Your Honor, it is tradition in the real estate industry in New York under management contracts, of which this case is an example, that the employees employed in a particular building are always—I can say almost without any exception—the employees of the owner. That is true under the Social Security Law, the owner is the one who is responsible for these payments; the same is true of the Unemployment Insurance Law of the State of New York, and the same is true of the Workmen's Compensation Insurance, and various other matters of that type which apply to the personnel employed in this type of building.

What we do concede here is that in the control and direction of these working forces, telling the employees what to do, what their shifts are, paying them off at the end of the week, and so forth——

Mr. ROZEN. Hiring and firing?

Mr. CLIFTON. Possibly. But the owner reserves the right specifically under the management contract to veto any such instructions issued by the agent. The net result is that Spear & Company acts as the agent for the owner in all of these matters as well as in the collection of rents and the renting of space, and so forth. So that I am unable to concede, because I do not believe it to be a fact, that the employees

are the employees of the agent. But I do admit, I think, in the answer, that so far as this case is concerned, the Government, if it succeeds, is entitled to have Spear & Company and the owner jointly bound by the terms of the restraining order.

The COURT. I should think so.

Mr. ROZEN. In other words, if we show that the maintenance employees are entitled to the benefits of the Act, an injunction will issue against Spear & Company and the Arsenal Building Corporation?

Mr. CLIFTON. As I pointed out to Mr. Rozen before, the usual form of an injunction runs against the defendants, its agents, servants and so forth.

The COURT. Yes.

Mr. ROZEN. Your Honor, in defendant's answer (handing to Court), the answer of the defendant, as you will see, your Honor, contains four or five affirmative defenses. Of course I am sure that Mr. Clifton interposed these defenses in good faith; but I think that time has now shown that some, if not all of them, are not proper at this time. I do not know exactly the limits of your Honor's authority and jurisdiction at pretrial conferences, but I do think that a great deal of time at the trial could be saved if some of them could be disposed of at this time.

The COURT. Well, first there are questions of law, aren't there?

Mr. ROZEN. Yes. There cannot be any question at all but what the first two are absolutely invalid.

The COURT. Do you stand on those defenses?

Mr. CLIFTON. The defense proposed in paragraph 12 we do not stand on at this time, because we were satisfied some time subsequent to the filing of our answer that there was jurisdiction.

Mr. ROZEN. That is withdrawn?

Mr. CLIFTON. That is withdrawn.

As to the jurisdiction of the subject matter, I think I should like for the present to have that remain because of its interrelation with the other defenses.

The COURT. That may have a bearing upon the proof as to the extent of the business done in interstate commerce.

Mr. ROZEN. Your Honor, under the statute, under Section 17 of the Act, which I have given you, the District Court of the United States is given jurisdiction over actions for injunction. So I cannot possibly see how there can be any doubt about the jurisdiction of the subject matter.

Mr. CLIFTON. You are assuming that the Act applies.

Mr. ROZEN. Even if it does not apply. We have got to have that question tested out somewhere.

The COURT. I think I will overrule that defense.

Mr. CLIFTON. All right.

Mr. ROZEN. Thank you, your Honor.

Now, the fourth defense is one of constitutionality.

The COURT. Has the Attorney General been notified?

Mr. ROZEN. I believe the proper steps have been taken in this case. I will make sure about that. I am glad your Honor suggested that.

Since the complaint was drawn, and since the answer has been interposed, the United States Supreme Court has ruled that the Fair Labor Standards Act is constitutional. As a matter of fact, it came down only a few weeks ago, February 3, 1941, the case of the United States of America against Darby Lumber Company; so I can scarcely see the merit of that at this time. At the time it was interposed——

Mr. CLIFTON. I think Mr. Rozen unintentionally, perhaps, has misstated the purpose of this defense. We make no claim that this Act is unconstitutional generally, or that there are not certain situations to which it might not be validly applied; but we do say if it is applied to the defendant and these employees, then it is unconstitutional.

The COURT. All right.

Mr. CLIFTON. I think that is quite a different thing; and that issue was not passed upon in the Darby case or any other case.

Mr. ROZEN. Well, it is a question of the power of Congress to enact legislation with respect to these employees.

The COURT. That is not going to hurt you.

Mr. ROZEN. No; but I would like to conserve the Court's energy and our own, too. But if we can't get Mr. Clifton to see the light at this time, we will have to postpone the discussion.

The fifth defense, your Honor, is rather an anomalous creature. It is labeled "Fifth Defense, separate and partial." As your Honor has in mind, this is an action for an injunction, and how you can have a partial defense for such an action, I cannot see. Either we are entitled to an injunction or we are not entitled to an injunction. There cannot be any partial defense to an action for an injunction. And I think Mr. Clifton will readily agree that a partial defense has no merit or substance in an action for an injunction. It would eliminate quite a bit of proof and necessity for preparation for trial if that defense were omitted.

Mr. CLIFTON. Here is the point of that defense, your Honor. The plaintiff alleged that subsequent to October 24, 1938, the

defendants did not pay their employes at the rate of time and a half for all hours worked in excess of 44, 42, or 40, as the case might be. The fact is that the defendants have for many years been parties to a collective bargaining agreement with an affiliated labor union which provides wages, hours, and working conditions. One of the conditions provided in these contracts, which are still in force and effect, is that time and a half shall be paid for overtime in excess of a certain number of hours, but those hours do not coincide with the limits set down in the Fair Labor Standards Act. The contract limits are slightly longer per week than those in the Act. And it was in an effort to show the true facts with respect to exactly what overtime was paid, that we labelled this rather anomalous animal a separate and partial defense. Moreover, it seems to me, although I have not the law handy, that in cases of this character the Court, as Mr. Rozen himself has said, is entitled to know all the facts, and it may be that some of the facts which are set forth in this defense will appeal to either the Court which tries the case, or the appellate courts, as being material to the issues raised by the complaint and the answer.

Mr. ROZEN. But again I repeat, your Honor, the fact that an employer has paid his employee time and a half, let us say, after a 50-hour week has been worked, is no defense either partially or wholly.

The COURT. I quite agree with you on that.

Mr. ROZEN. That may come out in the trial, perhaps, but as a defense it just can't be. You can't have a partial defense in an injunction; and as a total defense; private parties cannot get together and make a private contract in contravention of an Act of Congress.

Mr. CLIFTON. We do not make that contention.

Mr. ROZEN. So that whole defense should be stricken out and that would shorten the trial considerably.

The COURT. They will offer in evidence, I assume, the agreement they have with a labor union.

Mr. CLIFTON. That is right. And I think, Mr. Rozen will agree as to its authenticity. And it won't take but a minute.

The COURT. The trial court can pass on that. That won't take long if you will agree that that is the contract with the labor union.

Mr. ROZEN. I won't press Mr. Clifton on that point. I assume we will have access to the records of Spear & Company, and also Arsenal, so we can check any data that can be furnished.

Mr. CLIFTON. Certainly.

The COURT. Is that all?

Mr. ROZEN. I have nothing else.
Mr. CLIFTON. I have nothing else, your Honor.
Mr. ROZEN. Thank you very much, your Honor.

[CAPTION]

Before Hon. JOHN M. WOOLSEY, District Judge

NEW YORK, *March 24, 1941, 11:00 a. m.*

Appearances: Gerard D. Reilly, Esq., Solicitor; and Irving J. Levy, Esq., Assistant Solicitor in Charge of Litigation; Arthur E. Reyman, Esq., Acting Regional Attorney; and Irving Rozen, Esq., Senior Attorney, of Counsel, for the Plaintiff. McLanahan, Merritt & Ingraham, Esqrs., Solicitors for Defendants; Walter Gordon Merritt, Esq., and Henry Clifton, Jr., Esq., of Counsel. Kenneth C. Newman, Esq., Associate Solicitor for Defendants.

Mr. REYMAN. If your Honor please, may I introduce myself? I am Arthur Reyman for the plaintiff and Mr. Rozen is with me.

This matter is entitled Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, v. Arsenal Building Corporation and Spear & Company, Inc. It involves a suit by the Administrator for the Department to enjoin and restrain certain alleged violations of the Fair Labor Standards Act of 1938.

The COURT. I would not know what that is. I never read an act until it is brought to me officially.

Mr. REYMAN. It is the Wage and Hour Law, so-called, your Honor.

The COURT. Oh, yes; I have heard of that.

Mr. REYMAN. The complaint alleges, shortly, that the Arsenal Building Corporation, owners of a large building in midtown Manhattan, and their agents, have failed and refused to pay overtime rates to certain of their employees as required by Section 7 of the statute.

The employees involved are usually known as maintenance employees; that is, elevator operators, porters, electricians, and so on; the men who work at the building, keeping it in repair and doing certain prescribed chores around the building for the tenants and for the owners.

The Government maintains that the Act applies to them, and that they should be paid overtime rates for hours after the number of hours specified in Section 7 of the statute.

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and so on; the men who work at the building, keeping it in repair and doing certain prescribed chores around the building for the tenants and for the owners.

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So, briefly, the defendants denying this, the question before the Court is a question of coverage; that is, the applicability of the Act to the employees of these defendants.

The COURT. Have you any decisions at all for guidance?

Mr. REYMAN. There are District Court decisions and other decisions under another section of the Act.

The COURT. But not on this particular one?

Mr. REYMAN. No. One case was tried in Philadelphia some few days ago, and that case remains undecided, so this is a novel question.

The COURT. On the same question?

Mr. REYMAN. Practically the same question.

The COURT. Why is it the United States Attorney is not appearing in this case instead of some representative of the local concern? Is there a particular provision for that?

Mr. REYMAN. Yes; in Section 4 (b) of the Act, if the Court please, the Administrator may appoint attorneys, and attorneys appointed by him appear for and represent the Administrator in any litigation, but all such litigation is subject to the direction and control of the Attorney General. By official action of the Attorney General in a letter dated January 18, 1939, to the then counsel of our Division, all civil litigation was put within our Department, that is, the Department of Labor, subject to the general supervision of the Attorney General, and just recently the Attorney General in a Department of Justice circular has clarified that, so that we handle all civil litigation and the United States Attorney's office is in charge of all criminal matters.

The COURT. The reason I raised the question was that we had a great deal of difficulty at one time with the Alien Property Custodian and their having private counsel, or counsel of their own, instead of having the United States Attorney, and there were several decisions in those litigations in which they said it could not be done, and you would not understand, normally speaking, unless there is a mandate of some kind but that it would have to go through the law offices of the Government.

Mr. REYMAN. We understand that, your Honor. In fact, in other criminal cases where I have appeared and other attorneys have appeared before the grand jury, and so on, we are designated special attorneys. The matter has been thor-

oughly thrashed out and I would be glad to submit the authorities to you if there is any doubt in your Honor's mind.

The COURT. I do not know. I just raised the question. If the statute covers the matter, the question is whether you are yourself, so to speak.

Mr. REYMAN. There is no doubt in our minds.

The COURT. If Mr. Merritt has not any point to make on that question, I don't think there is any need raising it under this statute providing these gentlemen are properly appointed.

Mr. MERRITT. We are looking for a decision on the merits.

(Discussion off the record.)

Mr. MERRITT. I would like to say a word, if I may, just to completely orient you on this case without trying to be controversial at all. The defendant in this case runs a building, that is, the Arsenal Building, and the codefendant, Spear & Company, are managing agents.

The COURT. Who are the codefendants?

Mr. MERRITT. The Arsenal Building is the building in which these men are employed, and Spear & Company are their managing agents. They are not in any way engaged in interstate commerce. They rent space. It being a loft building, they rent space largely to manufacturers in the Garment Center, who produce goods for interstate commerce.

The two fundamental points which will arise are, No. 1, that the statute is limited to employers engaged in interstate commerce.

The COURT. Is not the Arsenal Building an employer?

Mr. MERRITT. Yes; but not engaged in interstate commerce. It just rents space and runs the building. That is our first point.

Our second point will be that the particular employees are not themselves engaged in interstate commerce, so thereon hangs the whole case. It is a question whether these porters, janitors, night watchmen, and elevator men who furnish the service that goes with renting space to manufacturers——

The COURT. That is cognate. I find the more you sit in a Federal Court the more you get to thinking horizontally instead of perpendicular, and in compartments.

Mr. MERRITT. Exactly. I just want to get to you what our viewpoint is.

The COURT. The idea of whether they are in interstate commerce or not, and therefore whether the law applies to them? I do not know what the law says. But you have to think also of the Employers' Liability Act under which railroad employees are sometimes in interstate commerce and sometimes not in

interstate commerce. I have had a number of those cases. I should think that would be one of the types of differentiating decisions you might consider.

As to the applicability of this Act, I really do not know, but I could well understand that these gentlemen here may want to make a record of exactly who these people are and everything of that kind. Perhaps you cannot stipulate all of those facts and they will have to make a record on it. I should think that would be a highly desirable thing to do.

Mr. MERRITT. I am not raising opposition to that.

The COURT. It is very old-fashioned to talk about things like demurrers because everything has been turned more or less upside down, but I should think that would be your position, practically a demurrer to the evidence.

Mr. MERRITT. I think it very likely will be.

The COURT. In other words, like a motion to dismiss their case at the end of it on which you would argue all these constitutional points and all these applicability points. I do not know whether there is any constitutional point.

Mr. MERRITT. The only constitutional point would be that if you interpret the Act as embracing all of these different classes of people, we will, of course, reserve the point that that would make the Act unconstitutional by giving it such an extended application.

The COURT. That is another question. Has not the constitutionality of this Act been passed on by the Supreme Court?

Mr. MERRITT. It has, and we do not raise any question as to constitutionality of the Act as a whole but, of course, we want to be free to argue that if you should say it applied to a bootblack——

The COURT. Yes; to a casual on the floor?

Mr. MERRITT. Yes; that would be giving an application which would be unconstitutional and therefore you would not give it such an interpretation. That would be one of our arguments, I mean.

The COURT. You give me all the cases that deal with this case in particular.

Mr. REYMAN. We will.

The COURT. And also differentiating cases on the question of the Employers' Liability Act.

Mr. REYMAN. We will cover them for you, your Honor.

The COURT. And then you put anything in that you want to on your side about it, Mr. Merritt; and you do not have to exchange your memoranda at all.

(Discussion off the record as to submission of trial briefs and memoranda of law.)

The COURT. Then suppose we adjourn this case until next Monday and at that time we will go on and take such evidence as you want to put in. I will give you all the time you need to ventilate every aspect of the case, and I hope at the end of that time I will be able to deal with it off the bench.

There is only one thing, and I will greatly appreciate it if you will get your trial briefs to me by Friday the 28th.

Mr. REYMAN. We will do that.

If your Honor please, as you may know, the Department has issued certain interpretative bulletins intended to guide the general public with respect to our views. We have no right to interpret the law, so we simply state our views, and if your Honor cares to have our views on coverage, I can submit them to you.

The COURT. I will hear that orally.

(Adjourned to March 31, 1941, at 11:00 a. m.)

NEW YORK, *March 31, 1941, 11:00 a. m.*

Trial resumed.

Present: Mr. Reyman, Mr. Rozen, and Miss Helen E. Cottrell, of Counsel for Plaintiff. Mr. Merritt and Mr. Clifton, Jr., of Counsel for Defendants. Mr. Kenneth C. Newman.

The COURT. Are all of the gentlemen and the lady here as counsel, members of the bar of this Court?

Mr. REYMAN. For our side they are. Miss Cottrell is appearing here this morning for the first time.

The COURT. Is that true of counsel for the defendants?

Mr. MERRITT. Yes, that is, your Honor.

The COURT. I have had the benefit of your trial briefs and have been over them with the greatest care. I have a few things to ask you about. I do not think we need to have a formal opening on account of the trial briefs. The question is rather clear, but I do want to take up one or two things with you.

In the first place, I will tell you that that First Circuit Court of Appeals case is reported now, Bowie v. Gonzales. It is in 117 F.(2d) 11.

I have one thing that I want to mention which I am afraid there will be a little bit of a cramp about, but I object to, in the briefs of counsel, ubi supra or ubi, and in a number of cases especially in the Government's brief that was used. It may be just a notion of mine but I am rather fussy about it and I like to have things referred to definitely. I am

merely telling you this because I think all judges feel practically the same about it. It is a nuisance to have to go back and look up where the thing was before when you are reading along.

I want to know in the first place some of the common grounds. It is practically common ground, isn't it, that there are circa 42 people who are tenants in this building? Is that right?

Mr. REYMAN. That is correct.

The COURT. Who are manufacturing tenants, we will say, or tenants that are in interstate commerce or sell to interstate commerce, or something like that.

Mr. REYMAN. That is correct.

The COURT. The second question is, aside from the barbershop and those two or three little things on the ground floor, there is nothing else in the building except these people that are engaged in manufacturing women's clothes and selling silks and that sort of thing which goes into interstate commerce. Is that right?

Mr. MERRITT. That is true except for the office of the management.

The COURT. Oh, well, you have to have a place for that.

Mr. REYMAN. There is also a trucking company, your Honor, on the ground floor, which is trucking materials that go out of the building. They have an office and place of business on the ground floor.

The COURT. When we were here before we dealt with your right to appear for the United States by your local attorneys, and now we have dealt with this question of membership in the bar, so you all have locus standi apparently.

Now I want to see, in appropriate course, the terms of at least one typical lease, if they are all the same kind of leases. I suppose you have that?

Mr. REYMAN. We are prepared; yes, sir.

The COURT. And I want to see the terms of the management agreement with Spear & Company. I was wondering why this particular building was singled out, and whether this is a test case or not. Is this a test case which will cover a lot of other buildings, or is this particular building sui generis?

Mr. MERRITT. I did not pick the case, your Honor. The Government could answer that question better than I, but there are, I understand, other buildings which are in the same situation.

The COURT. Is this a typical loft and manufacturing building?

Mr. REYMAN. It is typical of a good many. It was not particularly picked. It just so happened that it came into the legal division——

The COURT. No; I did not mean that you picked on it, but what I meant is that this was chosen or selected as a case that would be representative of something, or a series of other cases.

Mr. REYMAN. That is very true.

The COURT. We will deal later with the question of the partial defense, I suppose, involving that union agreement. I could not quite understand that.

Is there a New York State Wages and Hour Act?

Mr. REYMAN. Not like this; no, sir. There is a minimum wage act for women.

The COURT. There would not be anything that would be complementary to this, and would fill up any lacunae that were missing?

Mr. REYMAN. No, sir.

The COURT. I suppose somebody representing Spear & Company, if you have not agreed on it, will tell me about their relation to these maintenance servants, and what they have a right to do to them, and so forth?

Mr. MERRITT. We will follow your Honor's suggestion and produce, of course, the management contract.

The COURT. I must also know how they manage the contract. In other words, have they got the entire right to engage and fire them, or would they be just included in any relief that was granted as against the building, assuming that I should decide to give some relief as against the building? Would they be included merely as agents, the way injunctions usually read?

Mr. REYMAN. I was just going to call the Court's attention for a minute to the pre-trial conference.

The COURT. Yes; I saw that and read it.

Mr. REYMAN. Answering your Honor's question, we had intended to call someone from Spear & Company for the purpose of testifying as to the exact relationship, in addition to the management agreement.

The COURT. These pre-trial conferences may produce a great deal of nutriment to a District Judge, but this particular one, I am sorry to say, I do not think does that, although they shook out one or two of the defenses which were antedated by these Supreme Court cases.

Mr. REYMAN. We had agreed that if a case for injunction was proved against the Arsenal Building, it would also include the agent. That probably is the substance of what we agreed at the pre-trial. We do think, and we think we will show by facts, that the Government, if it is right, is entitled

to an injunction against both of the defendants because of the degree of control exercised by the building agent, Spear & Company, over the employes in question.

The COURT. There is a denial of paragraph 10 of the complaint. We will talk about the complaint as referring to the amended complaint. There is a denial of that, but isn't it a fact that the defendant intends to, unless enjoined, continue its present course? I mean, isn't that common ground?

Mr. MERRITT. Yes.

The COURT. I supposed so.

Mr. MERRITT. May I read just a page of a rather carefully prepared admission which I think will be helpful?

The COURT. Yes; but wait until I finish with the matters that I looked up and wanted to talk to you about.

Am I correct in assuming that there has not been any administrative decision, backed by an industry committee, or whatever you call them, of the Administrator, as to these maintenance employees here under consideration?

Mr. REYMAN. There has been a decision to the point that the Administrator is able to make it. We do not make administrative rulings in this type of case.

The COURT. Oh, you mean if you had an industry committee——

Mr. REYMAN. But the industry committees, if your Honor please, are engaged in a function entirely other than and outside of whether or not certain employees come under the coverage of the Act. The committees are set up to determine what may be done——

The COURT. On wages, is it?

Mr. REYMAN. That is right, outside of and away from Section 7 of the Act.

Mr. MERRITT. The answer is, is it not, Mr. Reyman, that there have been no industry committees set up for this industry?

The COURT. I supposed I would have heard about it if there were. The whole question here is whether all of these maintenance employees come within the ambit of this Act, or if not all of them, whether some of them do, isn't it? There may be conceivably quite a bit of difference in the status of the different employees. I should think, although I am not sure. I have not made up my mind at all. I am just feeling it out.

When you use the words "maintenance employees" I suppose that is an exclusion, by implication at least, and that implies that they do not take any part in, or are not employed in any way by the tenants, and they do not operate machines and they do not do any manufacturing for the tenants, isn't that right?

Mr. REYMAN. That is right.

Mr. MERRITT. That is true.

The COURT. Then are all the goods delivered by and delivered to interstate carriers, delivered and received in the tenants' premises?

Mr. REYMAN. So far as we know, the goods are delivered at the tenants' premises from interstate commerce and they leave the tenants' premises to go into interstate commerce.

The COURT. In the American Trucking case, the Supreme Court disagreed with the administrative ruling, didn't it?

Mr. REYMAN. No. The three-judge court, if your Honor please, before which the matter was tried in the first instance, took a view opposite than ours, but the Supreme Court reversed.

The COURT. But the Supreme Court decided contrary to the Circuit Court of Appeals.

Mr. REYMAN. Contrary to the three-judge court; yes, sir.

The COURT. I suppose I should see the pay roll of maintenance employees; or is that one of the things you are going to put in?

Mr. REYMAN. Yes; it is, your Honor.

The COURT. And rent bills, water and electricity bills—all those things.

Mr. REYMAN. We will have them.

The COURT. Then I should suppose the next thing in order would be for Mr. Merritt to read in his admission he has prepared, and perhaps that would clarify the matter somewhat. I have a very good idea in my mind about it now.

Mr. MERRITT. The defendants admit for the purpose of this suit only that they are not and have not been conformed to the provisions of Section 7 of the Fair Labor Standards Act in respect to the payment of overtime wages to employees of defendant Arsenal Building Corporation employed in or about the loft building of that corporation known as 463 Seventh Avenue.

It is admitted for the purpose of this suit only that with certain minor exceptions the tenants of 463 Seventh Avenue and the employees of said tenants are engaged in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act.

In justification of the aforesaid nonconformity the defendants contend that the Fair Labor Standards Act has no application to them or the said employees of the Arsenal Building Corporation, and that the mere fact that the defendant Arsenal Building Corporation is a landlord of tenants who produce

goods for interstate commerce does not bring the landlord or its employees under the Act.

The COURT. I should say you probably better go ahead now and make your record. I do not think it is necessary to have openings, because I know about it now, as I have gone over the matter so carefully, thanks to your brief.

Mr. REYMAN. There is one thing with respect to the pleadings we would like to call to your Honor's attention. We advised counsel on the other side several days ago that we did not propose to rely on the allegations of paragraph numbered 9 of the amended complaint, and do not propose to offer testimony in support of it, except as the testimony adduced may be applicable. In other words, technically I suppose we should move to strike those allegations.

The COURT. That is the rationale of the whole Act, isn't it?

Mr. REYMAN. It may be. We don't think these allegations are essential to support our action.

The COURT. I think one of the troubles of your complaint, if you do not mind me saying so, is that it contains too much of the terms of the Act and too little that is specific. It is just the way it is usually done with other matters when it possibly can be. When you have it so general that it would apply to anything that conceivably could come under the Act, and it is really just shaking your finger at the defendants for not having complied with it. That is what it amounts to. Instead of going into details and saying what you claim by the eighth paragraph. I think you better strike the ninth out and be done with it.

Mr. REYMAN. All right, sir; I so move.

The COURT. Motion granted.

Mr. REYMAN. One other thing. With respect to the proceedings our amended complaint in Paragraph 2 alleges the jurisdiction of this action is conferred upon the Court by Section 17 of the Act, and that at pre-trial we called the attention of the Court to the denial and that was taken out, that defense.

The COURT. Of course there are two kinds of jurisdiction matters, subject matters. You have to have a court that has competence to deal with the subject matter, and that we have in Section 17. Second, you have to have jurisdiction over the person.

Mr. REYMAN. That is true.

The COURT. You could not sue these people in San Francisco, probably.

Mr. REYMAN. The only point I was raising, your Honor, was that the general denial left standing after that is contrary to Judge Knox's decision at pretrial overruling it.

The COURT. Paragraph 2?

Mr. REYMAN. Yes, sir; of the amended complaint.

The COURT. I thought we had cleared that up. But go on if there is anything else.

Mr. REYMAN. At this time we have served our amended complaint, and we have not as yet filed it. I should like technically to file it before we proceed.

The COURT. Yes; you should have done it. Do you mean it has not been filed at all?

Mr. REYMAN. It has not been filed with the Clerk.

The COURT. Then the Clerk will take it. I have a copy of it, I suppose.

Mr. REYMAN. Yes, sir; you have.

The COURT. Then the Clerk will see that that is filed.

Mr. MERRITT. May I now ask a question, in the interest of practical expediency? The Government has subpoenaed six of our elevator men who are here today. That means some embarrassment in the building. If it is consistent with the Government's position it would be a great help if these men were called and allowed to return to their positions.

Mr. REYMAN. I had assumed, your Honor, that arrangements had been worked out so there would be no inconvenience or difficulty with the practical operation of the building.

Mr. MERRITT. We were not consulted.

Mr. ROZEN. I consulted Mr. Clifton about that, and said if it meant any embarrassment in running the building I would be glad to take it up and to satisfy their convenience. Mr. Clifton is associated with Mr. Merritt. If he had told us there was to be any embarrassment we would rectify it.

The COURT. There is no reason you should not get through with them right away, and they should not take much time.

GEORGE WASHINGTON SILVERA, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. ROZEN:

Q. Where do you live, Mr. Silvera?—A. 190 Richmond Street, Brooklyn.

Q. Where are you employed?—A. 463 Seventh Avenue.

Q. The building known as the Arsenal Building?—A. Arsenal Building.

Q. New York City?—A. That is right.

Q. What is your title there, Mr. Silvera?—A. Assistant superintendent and mechanic.

The COURT. Where is 463 Seventh Avenue?

Q. Will you describe the location of the building, Mr. Silvera?—A. The building is located at the northeast corner of 35th Street and Seventh Avenue.

Q. Is that region of New York City devoted to any particular industry or pursuit, Mr. Silvera?—A. It is known as the garment district.

Q. Would you say that this building, the Arsenal Building, is located in the heart of the Garment Center region?—A. I would think so.

Q. Will you describe the physical appearance of the building, Mr. Silvera?—A. The building fronts on Seventh Avenue, the main entrance. It runs approximately 120 feet, I believe. The southern face is on 35th Street and extends about 220 feet, I imagine.

Q. Are there entrances on both streets, Seventh Avenue and 35th Street?—A. There is a main entrance on Seventh Avenue and a secondary entrance on 35th Street.

Q. They both lead into the main hall?—A. They do.

Q. On the ground floor?—A. They do.

Q. Is this a plan of the building as you know it, Mr. Silvera? [Hands paper to witness.]—A. Yes, this looks familiar.

Mr. ROZEN. I think this will be convenient for the Court.

The COURT. What is your job there?

Mr. ROZEN. He said he was assistant superintendent and mechanic. I want to offer this in evidence. It is a pamphlet gotten out I believe by Spear & Company, and contains a description of the building, the floor plan, and so forth.

Mr. MERRITT. Is it offered for that purpose only?

Mr. ROZEN. Whatever is contained in it.

Mr. MERRITT. Then I will have to read it very carefully.

The COURT. Mark it for identification. If he wants to admit it later he can. All of these exhibits are usually marked for identification first, and then you can say "I show you this paper marked for identification."

(Marked "Plaintiff's Exhibit No. 1" for identification.)

Q. How long have you been employed in the Arsenal Building?—A. Over six years.

Q. Where were you employed prior to that?—A. Immediately prior I was aboard ship as an electrician for the Grace Line.

Q. Will you describe for his Honor the general nature of your duties, Mr. Silvera, please?—A. My general duties are

to take care of everything mechanical about the building, all minor repairs.

The COURT. Are you what is called a handyman?

The WITNESS. That is right.

Q. Do you do any electrical work, Mr. Silvera?—A. On occasions I do. Whenever I am ordered by the superintendent, and outside of that I maintain the elevators, look over the switchboards, renew contacts and brushes, and make adjustments, and so on; clean up the commutators, and everything pertaining to maintaining the machinery in the building.

The COURT. Are the elevators run by electricity?

The WITNESS. They are.

Q. Where does the electric current come from that supplies the elevators?—A. The main service comes in on 35th Street, into the basement, to a main switchboard room known as the Edison room in the building.

Q. And you keep that system in repair, do you?—A. I have to go down there and put in fuses and so on when they blow out.

The COURT. But I can do that myself.

The WITNESS. Make minor repairs, as far as that goes.

The COURT. I suppose you do not do the actual——

The WITNESS. Construction work?

The COURT. Construction work.

The WITNESS. Yes; I have done quite a lot of it.

Q. Do you repair broken wires in the building?—A. Yes.

Q. You also maintain and repair the elevator motors?—A. I do. Renew the armatures when anything happens to them, when they are burned out; remove them and put in a spare, or send it out to be repaired.

Q. What other work do you do in connection with the elevators?—A. I maintain the cars as far as operation of doors, gates, and door checks on the doors, on the passenger cars and freight cars or service cars, both.

Q. Is it a daily part of your work to look after the armatures?—A. Oh, yes; that is one of the first things we do every morning, to look over the switchboards and motors and see that adjustments are in fairly good condition. Sometimes we catch one where there is a badly burned contact and renew it immediately, or an adjustment of a valve or something of that kind, or the carbon burned out. It has to be brought up to make a special contact, and things like that.

Q. How many passenger elevators are there in the building?—A. Five.

Q. How many freight elevators?—A. Four.

Q. You have to work on the generators of the elevators from time to time?—A. We have two small motor generator sets for the signal system, low-voltage, producing about 16 volts, for the operation of the signals.

Q. Do you work on them and maintain these generators?—A. I do.

Q. What about the general electrical system in the building; do you repair that and keep that in maintenance?—A. I do. I have to do electrical work throughout the building on various occasions, as I am ordered by the superintendent.

Q. The building gets its electricity where?—A. From the basement switchboard room. It goes up through the building on the east and west side, through what are known as risers, to panel boxes on the east and west side. From there it is distributed to the tenants and halls and various parts of the building.

Q. Does the landlord sub-meter electricity to the tenants?—A. We have a concern, a meter corporation, takes care of the meters there.

Q. They read the meters, you mean?—A. They take the readings, with the exception of a tenant removal or a tenant has not paid his rent or something of that sort. Then we shut the current off. The superintendent takes a reading of that and keeps a record.

Q. But the current is sold by the Arsenal Building Corporation or Spear & Company to the tenants?—A. The actual sale, yes; but I know that the metering is done by this meter corporation. They install the meters and take the readings. I believe they even make out the bills and bill them through Spear & Company. I believe that is the way it is done.

The COURT. Aren't they just representatives of the electric company that furnishes the power?

The WITNESS. No, sir. Do you mean the Edison Company?

The COURT. Yes.

The WITNESS. No, sir.

The COURT. Who are they; where do they come from?

The WITNESS. They represent the agents or the owners, I believe.

The COURT. They just check these things?

The WITNESS. They take care of the meter reading and billing, and so on.

Q. They take the reading so Spear & Company or the Arsenal Building Corporation knows how much to bill the tenant monthly; is that correct?—A. That is the way I know it to be operated.

The COURT. They call them sub-meters, don't they?

Mr. ROZEN. Yes, your Honor.

Q. And do you also keep this general electrical system in repair?—A. As far as fuses or blowing out or anything of that kind, or short circuits, minor short circuits, renewing them, and the sockets throughout the halls, the lights not operating properly, and switches. I take care of that, yes.

Q. Do you also do plumbing work in the building, Mr. Silvera?—A. I do.

Q. Will you describe some of the work you do in connection with your plumbing duties and the facilities that you work on?—A. I maintain all the flushometers throughout the building, that operate for the sanitary purpose of the toilets, and the wash basins, slop sinks, faucets, leaks; keep washers renewed, occasionally renew worn faucets, broken pipes here and there. Minor repairs, small jobs.

Q. The building furnishes water to the tenants, does it?—A. Well, in some cases. I believe some of them are metered for their water. I do not know just how that operates exactly in detail. Then in some cases they get their water from the slops, and the water lies in the slop sinks; they run it in for small steam boilers and things like that.

Q. The water furnished to the water tank system and pressure tank system is maintained by the building; is that so?—A. That is right.

Q. When you say metered do you or do you not mean that some of the tenants pay for their water directly to the landlord?—A. I believe like the barbershop, he has meters on his water supply, and similar instances like that.

Q. But all the water goes through the water supply system erected and maintained by the building; is that true?—A. That is right. That is right.

Q. Will you describe the water system in this building, Mr. Silvera?—A. The water main enters on 35th Street and goes down into the boiler room proper, and at the entrance to the boiler room on the right-hand side are numerous meters, and valves controlling the supply, and as you pass these valves going into the boiler room proper you come to a suction tank.

Q. Never mind the details of that. Is there a water tank on the roof?—A. Oh, yes.

Q. How many are there?—A. There are altogether four tanks up there, containing water, one known as the sanitary tank——

Q. What is that used for?—A. That is used for drinking water.

Q. The building furnishes drinking water to the tenants?—A. Well, no; they supply the water, yes; that goes into the coolers, but the tenants supply their own coolers where they have them, as I understand it.

Q. The other tanks are used for what purpose?—A. One is known as the gravity tank, used to operate the sprinklers and standpipe lines and so on below the 11th floor. Above the 11th floor there are two tanks known as pressure tanks which operate from the automatic sprinkler. They are kept at 80 pounds pressure, with 9,000 gallons of water in them.

The COURT. That is merely for fire prevention?

The WITNESS. That is right.

Q. Do you maintain and repair these tanks?—A. I do not do any more than keeping them at proper level of water and air pressure.

Q. You check them to see they have the proper water level and air pressure; is that it?—A. Occasionally pack a valve for a leak, where there is little packing, take care of the commutators and compressors, put in valves and keep them up, to keep the air pressure at the proper pressure.

Q. Is the sprinkler system connected up with this gravity tank you mentioned?—A. The sprinkler system below the 11th floor.

Q. Is there a sprinkler system throughout the building?—A. Throughout the entire building.

Q. Will you describe in detail the appearance and extent of the sprinkler system?—A. The sprinkler system is maintained by the automatic sprinkler people; I believe it is a Canal Street phone number. They have that hanging up there. And if one of these heads go off where there happens to be a fire, it creates temperature sufficient to let that head operate it as——

The COURT. Thermostatic control?

The WITNESS. It is a thermostatic piece of metal there that melts and this head opens and puts out the fire. Due to the head opening there is a water flow created which operates the water-flow mechanism that signals the automatic sprinkler people.

Q. Is this sprinkler system throughout the building in all the premises of all the tenants in the building?—A. Through the entire building.

Q. Do you keep that in repair?—A. To the extent that when there is a fire we stop down the supply line to the head that is gone and renew the heads, and so forth, and open it up again when the fire is out.

Q. You do renew a head?—A. Oh, yes.

Q. Exclusive of fires, do they ever get out of repair?—A. The heads?

Q. Yes.—A. No. We never had one that I know of since I have been there.

The COURT. It is a very serious matter for a building if a thing like that happens, I should suppose.

Q. Do any of the sprinkler-system pipes leak occasionally?—A. Yes; we have had occasional slight leaks and I have gone in and taken up on the bolts on the valve heads and the like of that stopped it.

Q. Then outside of this corporation that you refer to as maintaining the sprinkler system, you do not mean that they come in and physically repair it, do you?—A. Yes; they do. I don't know how the arrangement is made as far as the agreement we have, because once there is an alteration takes place, there is a law as regards the spacing of these heads. I believe it is five feet from a wall there must be one and then ten foot apart. There cannot be more than that in a room, and so forth, and if they strike new walls, and so on, they have to alter the position of those heads, and those people come in and do that.

Q. But the daily routine types of taking care of the sprinkler system and repairing leaks and the various other activities connected with it are performed by you; are they?

Mr. MERRITT. Now, don't.

The COURT. That is a very leading question and actually would not mean a thing to me. I understand what he does. He is a handyman; he does little odds and ends, and if somebody finds a weeping rivet or something like that he gets him to come up and straighten it out. I don't see any use going into all this in such detail.

Q. Where were these flushometers and wash basins you referred to located?—A. There are two toilets east and two west; one men's room and one ladies' room.

Q. On each floor?—A. On each typical floor from, I would say, the second to the 21st floor, which are practical typical with the exception of setbacks, and so forth.

The COURT. You have not yet said how many floors this building has.

The WITNESS. It is known as a 22-story building.

The COURT. You mean you know it as a 22-story building, if it has only four stories. How many stories has it got?

The WITNESS. It has 22, and above the 22nd floor roof are the penthouses, and so forth, and we do not count those as floors. They contain the elevator machinery, and so forth.

Q. Are there any lavatories located in the premises of the tenants?—A. Oh, yes; where there are private floors they have the entire use of the toilets and they are private to those floors.

Q. Do you keep those in repair and maintain them, too?—A. I do.

Q. What about the radiators located inside of the tenants' premises?—A. I have to take care of them, stiff valves, and so forth. I shut off the steam from the basement and remove bubbles and repack them with graphite packing, oil, and so forth, that make that operate easier, and replace them.

Q. Who supplies the heat to the tenants?—A. The building supplies the heat.

Q. And there is a fireman employed by the building that takes care of the heating?—A. Yes; we have a fireman.

Q. Where do the tenants get their water for manufacturing purposes?—A. Well, they make connections from the east and west lines, as required, and run them into their lofts. In cases where they are not private lofts they run them across the hall into the premises to the small boilers they require for pressing, and so on.

Q. Do you do special work on the elevator owned or controlled by Max Wiesen?—A. Yes; I do.

Q. Will you describe that elevator for us?—A. I have been in there to renew for them and clean off contacts.

The COURT. I do not understand that.

Mr. MERRITT. I do not, either. You are testifying, Mr. Rozen.

The COURT. Please ask questions instead of telling this man what to say. What is it you want to ask him now?

Q. Will you describe the elevator that runs between the 17th and 21st floors?—A. There is a privately installed elevator. It is privately owned. It is owned by Max Wiesen Company and runs from the 17th to the 20th floor with openings on each floor. It is operated either manually or automatically. They have a man there most times throughout the week during the day and when this man goes to dinner or anything like that they put in a little switch that causes it to be operated automatically.

The COURT. That is just between two floors, is it?

The WITNESS. Four floors.

Q. Are any other tenants in the building permitted to use that elevator?—A. No; no other tenants use that elevator. That is controlled by Max Wiesen Company.

Q. This Max Wiesen occupies the entire floor space, does he?—A. He occupies the 17th, 18th, 19th, 20th, and 21st floors, and half of the 15th.

Q. What floor does the elevator run to?—A. Between 17 and 20.

Q. Do you do any work on that elevator, Mr. Silvera?—A. Yes; I do. I have sent men there quite often to see what is wrong and to put in fuses, and so forth.

Q. Have you ever done any work on the windows or latches?—A. Yes; that is part of my work, to maintain the windows; and if a chain breaks to renew the chain on the pipes and repair latches, and so forth.

Q. If the windows get stuck are you called in to help or not?—A. We have to go over them practically every time a painter goes in the place. They become so stuck up you cannot move them with a jack. You have to ease up the cracks by putting in wedges, and so on, and grease them.

Q. What work do you do, if any, with respect to electrical fixtures located in the premises of the tenants?—A. Well, if they have a fuse blown out and minor troubles, and so forth, something that can be fixed in a hurry, to help them out, to put in a socket or switch or repair a little plug on a cutting machine or something of that kind, those kind of jobs.

Q. You mean by that that you do minor repairing work on the actual manufacturing machines?

Mr. MERRITT. Just a minute. I think we are leading again.

The COURT. Yes. That does not make any difference whether he does or not. What else do you do? What sort of machines have they got?

The WITNESS. Cutting machines.

The COURT. And electric sewing machines?

The WITNESS. Sewing machines, pressing irons.

By the COURT:

Q. And if those electric fixtures need a little something done to them, I suppose as handyman in charge of the building, so to speak, you are called on, and some of your assistants, too, is that it?—A. I have one assistant, but he is——

Q. What is his name?—A. He is mostly running errands. Arthur Lipsman.

Q. L-i-p-s-m-a-n?—A. I believe that is the way he spells it.

By Mr. ROZEN:

Q. Is there an incinerator in this building, Mr. Silvera?—A. There is an incinerator in the building in the basement which has been installed possibly within the past year.

Q. Do you have any duties in connection with that incinerator?—A. Well, there is nothing that I do there, on that incinerator, no. I have not had any work there. I did have to——

The COURT. What is it for? What is an incinerator for there? To burn up the trash——

The WITNESS. Rubbish in the building; dispose of rubbish. I did have to repair a handrail there that was not solid, and cut a hole in the brick wall and bolt it to the brick wall and make it rigid.

Q. In addition to the four freight elevators, Mr. Silvera, what other facilities are there for the distribution or movement of packages in the building?—A. They have a package chute which is used exclusively for the Railway Express Company, which was placed on the premises for their exclusive use.

Q. Will you describe that package chute, please?—A. Well, the package chute has a door on each floor with an opening approximately 3 by 3, or I would say no more than that, I do not think, and this chute has a spiral affair of metal and you just drop the packages in and they go down to what is known as the mezzanine, part of which the Railway Express has for their exclusive use, and then they have a driveway in connection with this mezzanine where they back their truck in and the packages come down the chute and then they have a roller affair and they put these packages on and they go down this roller affair to a chute to the trucks, and they are loaded in the trucks there.

Q. Are the trucks parked on the street?—A. No; they back right into what is known as the Railway Express driveway on 35th Street.

Q. Is that a sort of structure within the building itself?—A. Oh, yes; it is part of the building.

Q. Won't you describe it more carefully for the Court?—A. It is a driveway with a large straight drop door.

Q. That is flush with the building wall?—A. That is it.

Q. And the trucks back inside?—A. Back right inside to a loading platform.

By the COURT:

Q. They raise this door?—A. On a chain.

Q. Yes. We have one down in the building here for the judges. They raise this curtain or whatever you call it——

A. Yes; a steel curtain.

Q. And then the trucks can back in or drive in or what not, pick up their loads?—A. That is it.

Q. So you have this chute that goes down spirally, as I understand it, is that right?—A. That is right.

Q. And of course that will be the only safe way to keep from perhaps setting some of the packages on fire, as they did up in the Medical Center when they first began because the spiral lets these packages down gradually.—A. Yes. All the doors are maintained with lock and key by the Railway Express Company. If they want to use the chute on the eighth floor they open it and then lock it as they finish.

By Mr. ROZEN:

Q. You mean the American Express Company only has keys?—A. That is it. It is entirely private.

Q. Do you do any work at all in connection with that chute?—A. I have occasionally tried to help repair a lock or something of that kind, but otherwise I have not done anything on it.

By the COURT:

Q. Are you around there when the American Railway Express is getting packages?—A. I am around the building at all times. I have to let them know at all times just where I am, in case of emergencies, and so forth.

Q. Do you know just exactly what happens, so far as the Railway Express Company is concerned? Does somebody from the Railway Express Company go up to the floor whence the packages are going to be sent down by the spiral?—A. That is right.

Q. And they unlock the doors themselves, which doors look like dumbwaiter doors or something like that?

Mr. ROZEN. Exactly what they look like, your Honor; dumbwaiter doors.

A. That is it.

Q. I am just guessing at it. And then they put their packages on the inclined spiral and the packages work their way down eventually to the place where the Railway Express truck is waiting to take them on board, is that it?—A. They come down and out of the bottom of the chute on the mezzanine onto a sort of platform, and there is a man there that picks them up and checks them over and puts them on a roller affair and they go onto the truck.

Q. Is that all done by Railway Express employees?—A. Railway Express employees.

By Mr. ROZEN:

Q. Do you know at what point the Railway Express man picks up the packages that he puts in the chute?—A. He picks them up from the premises of the tenants.

Q. Who supplies light to the premises occupied by the Railway Express Company?—A. The building.

Q. And heat?—A. The building.

Q. In addition to the facilities furnished the Railway Express Company, are there any other facilities or space furnished the Railway Express?—A. Only what I have mentioned, I believe.

The COURT. What is the proper word to describe that place down below where the Railway Express backs its truck in?

The WITNESS. A driveway, I would call it, a driveway and loading platform.

Q. Do they also have office space in the building, the Railway Express?—A. The office space and everything are incorporated on the mezzanine where the packages come out. They have a couple of desks there to make their records, and so forth.

Q. Have you ever seen the Railway Express Company officials located in any other part of the building? I do not mean when they make their rounds, but I mean permanently having been there for part of a day?—A. No, I do not think so, except that they go into a big tenant's place and stay there quite a while, like Max Wiesen's. They are there a couple of hours, if that is what you mean, but that is the only instance where they are in any one location any great length of time.

Q. Will you describe the freight elevator entrance on the street level, please?—A. The freight elevator entrance is on 35th Street, the main entrance.

Q. About how wide is it?—A. The main opening is, I would judge, about 12 feet or something like that.

Q. Is there a steel curtain there, too?—A. There are two immense doors that swing outwardly, immense heavy doors.

Q. And how deep is that entrance there, about?—A. Oh, 40 or 50 feet; I am only guessing at its length, but it is quite a big spacious hallway in there. You go straight in and then around to the left where the elevators face. What I mean by straight in is it would be like walking north from 35th Street into the building.

By The COURT:

Q. What do the freight elevators move? These packages that are sent down to the spiral?—A. What do they move?

Q. What do the freight elevators carry up and down and how do they get that; say a person who is bringing something to the building, for instance?—A. They come in this main freight entrance and walk straight in and then turn to the

left and the elevator entrances are there in the main freight hall.

Q. As I understand it, and perhaps I am quite wrong on it, the outgoing shipments are taken by the American Express, are they? Is that right, as a rule?—A. Not all of them. They have numerous express companies that come in there and pick up packages.

Q. But some express company or other takes them off the spiral? In other words, does somebody also come in and take them off the freight elevators?—A. Oh, yes.

Q. And going out, too?—A. Only what the Railway Express Company handles comes off the spiral.

Q. Everything else comes off the freight elevators?—A. Freight elevators.

Q. And everything that is going up, of course, I suppose has to go in the freight elevators?—A. That is it.

By Mr. ROZEN:

Q. Do any other companies besides the American Railway Express Company use the spiral chutes?—A. Nobody else. It is exclusive.

The COURT. They have the keys to it. He just told us that.

Q. Were you employed by the Arsenal Building during the period of the maintenance employees' strike?—A. I was there during the period of one of the strikes, and I started there just prior to the first strike that was called.

Q. When was this, Mr. Silvera?—A. In the latter part of 1934 I think it was.

The COURT. The last strike?

The WITNESS. That was the first one.

Q. And was there another strike, Mr. Silvera?—A. There was another one. I do not know the date of it, but a couple years ago it must have been.

The COURT. The second one was worse than the first, if I recollect right?

The WITNESS. Yes.

Q. Were the employees in the Arsenal Building out on both of the strikes you refer to?—A. Yes; they were.

Q. Were the elevators running during that strike?—A. Not to any extent that I know of unless somebody ran them that I did not know of. The operators were all out.

Q. Was there any heat in the building during the strikes?—A. Not as I have been given to understand. The boilers were shut down.

Q. Were the tenants producing at that time?—A. What they could manage to do. Some of them would walk up and see

whatever they could do. They did not do much though, I do not think.

Q. Were there other employees hired to operate the elevators during the strikes?—A. No; there were no operators hired They had watchmen, though, is all I know of.

Q. Were the elevators running or were they not?

Mr. MERRITT. He said they were not to any extent.

The COURT. He said he did not know.

The WITNESS. They were not running to my knowledge.

Mr. ROZEN. Your Honor said he testified he did not know and Mr. Merritt said he testified they were not running.

Mr. MERRITT. They were not running to any extent, but he did not know.

The COURT. That is what I thought he said. If they were running it was not within his knowledge.

Q. What would you say was the effect of the strike upon the tenants in the building?

Mr. MERRITT. Oh, I object to that.

The COURT. Objection sustained.

Q. Were the tenants open for business, Mr. Silvera?—A. Oh, yes; they all came and tried to get by as best they could.

The COURT. Anybody who lives in an apartment house in New York City knows exactly what it is like. I live in an apartment house myself.

Q. Mr. Silvera, did you make a record of your daily duties in and about the building?—A. I was required to make a daily report to the superintendent. He said his office wanted that and I did that.

Mr. ROZEN. Do you have such a book, Mr. Merritt?

Mr. MERRITT. It is the first I have heard of it.

The COURT. That is a sort of a log?

Mr. ROZEN. That is exactly what they call it, your Honor. That is the exact term.

The COURT. What good would that do us?

Mr. ROZEN. Just so your Honor could see the exact details of his duties and so I would not have to go into it any more than I have. I would like to offer it in evidence as showing exactly what this man did.

The COURT. I think he has told us all that. I live in an apartment house and I know handymen and I have known them all my life and I know the sort of things they do and I do not need to be told about that just because it happens to be a loft building. There are certain things that everybody knows.

Mr. ROZEN. I know, but we are trying to make a record of those things. So I will reserve the offer at this time.

Q. Is there any other apparatus in the building that you have not described to us, Mr. Silvera, that acts as a watchman?—A. They have an electric, what is known as an electric——

The COURT. Electric eye?

A. (Continuing.) Electric eye, and on the two stairways in the building. I maintain that.

Mr. ROZEN. That is all I have, I think, your Honor.

(Short recess.)

Cross-examination by Mr. MERRITT:

Q. Isn't it true as a general proposition that the employees of the Arsenal Building have nothing to do with the maintenance of the machinery of its manufacturing tenants?—A. Well, in my position, my work is to follow out the orders of the superintendent and that has involved me in doing some work in the tenant's premises, considerable work at times.

Q. Cannot you say as a general proposition it is not part of your duties to maintain the machinery in the tenants's premises?—A. I cannot.

Q. Are you prepared to testify it is one of your regular duties to take care of the machinery of the tenants in their respective manufacturing premises?—A. I am. My duty is to follow out the orders and instructions of the superintendent.

Q. And it is part of your regular duties, is it, as you are instructed, to enter these tenants' premises and to look to the upkeep of their machinery?—A. As I am instructed, that is right.

Q. And you are constantly instructed that way, are you?

The COURT. You must get asked in. You don't enter the premises without being sent for, do you?

The WITNESS. The superintendent gives me orders to do such and such a thing and I go and do it.

The COURT. I don't blame you for doing what the superintendent says, but what I want to get at is the tenants send through the superintendent for you, is that the idea?

The WITNESS. In many cases and not in many cases.

Q. And you never enter the tenant's premises to do anything except on the direction of the superintendent?—A. No. I did enter the premises on many occasions when I was not given orders, if they came to ask me—I have been given orders verbally and written also, in many cases, and the operators and so forth tell me, well, there is a leak in such and such a place, and I have to go in and take care of it.

Q. Who do you mean by the operators?—A. The elevator operators. The superintendent will go up and say, "Tell

George to go in and see what is wrong in such and such a place," orders similar to that.

Q. That is an order from the superintendent, isn't it?—A. That is right.

Q. I am asking you if you have ever gone in to repair machinery in the tenant's premises used for their own manufacturing premises, except when you were requested so to do by the superintendent?—A. Yes, I have.

Q. Don't you know that is a violation of the rules and regulations of the building?—A. No; I do not think it is.

Q. You do not know that?—A. No; I do not think it is.

Q. Isn't it a fact that there is a notice published in the locker room forbidding you to do that?—A. I don't think there is.

Q. You have never seen such a notice?—A. What locker room are you referring to?

Q. In this building?—A. My locker room is in private quarters.

Q. In any locker room of this building are you prepared to say there is no notice of that kind?—A. I have not anything in my locker room to that effect.

Q. Have you ever seen anything in any locker room in this building to that effect?—A. I believe some time ago there was—now you recall it to my mind—there was some kind of notice of that type put up.

Q. And it is still there?—A. Probably is; I do not know.

Q. And it has been there a great many years, hasn't it?—A. A great many years?

Q. Yes.—A. Not a great many.

Q. It has been there ever since you have been there, hasn't it?—A. No.

Q. When was it put in?—A. Within the last couple years.

Q. Then you do recall now that it has been there about two years?—A. Probably.

Q. So when you enter those premises and you work without directions from the superintendent, you are violating that notice and regulation, are you not?—A. Absolutely; yes.

Q. Why did it take you so long to admit that fact?—A. Because I did not recall at the time you first mentioned having seen that notice put up there.

Q. And you did not recall that you were constantly violating the rules of your employer in this matter?—A. If I had not taken care of those difficulties—I had to rely on my own knowledge of the requirements of taking care of those difficulties, because I was in charge of that when the super-

intendent was off on his vacation. That notice did not apply to me in its entirety.

Q. Give me an illustration of the type of difficulty you mean?—A. Well, if the tenant happened to have the lights out and so forth; fuses blown.

Q. Don't you know my question related to your maintaining their machinery? That is the question I was asking you about.—A. Well, their machinery? Maintaining their machinery is maintaining the source of current supply, and so forth, also, I think.

Q. I am not talking about lights——

The COURT. He is not talking about that. You answer his questions.

Q. You have testified that as a regular part of your duties you entered the tenants' premises from time to time to repair and maintain their machinery used for manufacturing purposes, didn't you? Didn't you so testify?—A. Yes; as regards light sockets, fuses, and so forth, and similar things of that kind; yes.

Q. Did you ever go in for the purpose of repairing or maintaining their machinery?—A. As a duty, you mean?

Q. Either as a duty or not as a duty.

By the COURT:

Q. Under any circumstances.—A. On occasions I did; yes.

Q. And what sort of repairs do you mean when you are talking about that? Let us get down to actualities. I cannot think of these things in theories. Let us get at the facts.—A. I repair things for the tenants.

Q. Sewing machines?—A. Well——

Q. Pressing machines?—A. Well, those things were not done in the actual line of my duty. At times I did a thing like that as a personal favor or something of that kind.

Q. Do they pay you something?—A. Well, they did if they felt inclined, or if I had expenses involved they would allow me for whatever expenses I had.

Q. Well, little extra-curricular work, we will call it, that was done by you for which you probably always hoped to and often received, a gratuity, is that it?—A. That is right to a great extent.

By Mr. MERRITT:

Q. So that on the side and contrary to your rules, you occasionally did this sort of thing for the purpose of making a little extra money?—A. Occasionally.

Q. And only occasionally?—A. That is right.

Q. You understand the difference, do you not, between entering a tenant's premises to take care of the building and put in sockets, for instance, for lighting, and entering the tenant's premises for the purpose of having to do with their own special business? You understand that difference, don't you?—A. Yes; I do. I think I do.

Q. And you quite frequently, as I take it, enter the premises on tenants' request, or by direction of the superintendent, to put in a light in a socket?—A. Oh, yes; and do other extensive work.

Q. Other extensive work?—A. That is right.

Q. Tell us what the other extensive work is?—A. Well, I have been given orders to install new feeders for electric work in tenants' premises.

The COURT. That is on orders of the superintendent?

The WITNESS. That is right.

The COURT. For which you were paid by the building. You were not paid by the tenant at all. It was something done in the line of your work under the superintendent.

The WITNESS. That is right.

Q. What do you mean by new feeders?—A. Well, Mr. Schneck required some new feeders run for some machinery he was installing when he made some recent changes on the 11th and 12th floors. He had alternating current put in for some new machinery and I had to run the feeders for that from the hallway on the 11th floor and put up the meter pans, and so forth.

Q. When you say feeders, you mean wires?—A. That is right.

Q. Or cables from the main feeder wire on that floor of that building?—A. From the source of supply in the freight hall into his machines.

Q. Or to the point where it was to be connected up with his machinery?—A. That is right.

By the COURT:

Q. I suppose you have all alternating current there, haven't you?—A. We have both.

Q. What is the main source of supply?—A. D. C.; direct current.

Q. Then, of course, you would have to have converters, wouldn't you for people who used alternating current?—A. No; we have both coming in from the street. They recently installed the alternating current in part of the building.

By Mr. MERRITT:

Q. This particular job you are speaking of where you installed these meters, wasn't that a special job where you were changing from a. c. to d. c., or d. c. to a. c.?—A. A special job?

Q. Yes.—A. I do not know. I would not determine it a special job.

Q. Was it a job where you were changing from a. c. current or from d. c. to a. c.?—A. I think they were going to get some new machines in or something of that kind. I don't know what they used the a. c. for. They are still working on it, I believe, even now.

Q. But you do know they wanted a. c. current?—A. That is right.

Q. And they were not then getting it?—A. That is right.

Q. So you were installing these wires for the a. c. current so it could run into those premises, is that right?—A. That is right.

Q. Who is your superintendent?—A. Mr. Joseph Ferdinand.

Q. Has he been your superintendent during the entire period when you have been in the building?—A. That is right.

Q. So whenever you have referred to getting directions from the superintendent you are referring to Mr. Ferdinand?—A. I am.

Q. Do I understand whenever the superintendent is present in the building you do not undertake to enter a tenant's premises except when you receive orders directly or indirectly from him so to do?—A. Whenever he is in the building?

Q. Yes.—A. No; there is many an occasion that somebody from one of the tenant's lofts might tell an operator, "There is a leak at so-and-so" and that I should go and see what it is, and figuring it might be bad I go down and take care of it and see what kind it is and what it is all about, and he knows at the end of the day I have done that because I put it in my report.

Q. Wherever you have done anything of that kind it would appear in your log?—A. That is right, in the daily report.

Q. Showing what you have been doing during the day?—A. That is right.

By the COURT:

Q. You would not put in those cases where you went in and did something at the tenant's request for which they gave you a gratuity, you mean?—A. Personal affair, you mean?

Q. Yes.—A. No.

Q. That would not go in your log at all?—A. No.

The COURT. I can understand that.

The WITNESS. Not as a general thing it would not be in there.

By Mr. MERRITT:

Q. You referred to this package chute which you say is the exclusive facility of the Railway Express?—A. Yes, sir.

Q. Is that correct?—A. Yes, sir.

Q. Only the Railway Express uses it?—A. Yes, sir.

Q. The Railway Express maintains it, does it not?—A. To the best of my knowledge.

Q. The building has nothing to do with its maintenance so far as you know?—A. No; so far as I know that is right.

Q. You have seen representatives of the Railway Express come in and do things to it, haven't you?—A. Well, the only point I have seen them doing anything to it, that man on the immediate job, the expressmen themselves, they try to fix the locks when they are out of order, and so on.

Q. Does this chute serve every floor of the building?—A. From the 21st to the mezzanine it operates.

Q. But even in those floors from the 21st down is it not a fact that a very large quantity of the freight goes down in the elevators and is carried away by truckmen?—A. Oh, a considerable quantity. It goes in and out through the elevators; various truckmen go out with any raw material and it comes back in dresses, and so on.

Q. And it is true, is it not, that these manufacturing tenants hired a trucking contractor to come to the building and receive the finished goods and cart them away?—A. That is right, I believe. I believe that is right.

Q. And these truckmen so hired enter the premises of the tenant, take possession of the freight in the tenant's premises and load it on to the elevators?—A. Yes, sir.

Q. And then it goes down in the elevators to the ground floor; is that correct?—A. Yes, sir.

Q. And then when it reaches the ground floor it is unloaded by the employees of the trucking company; is that true?—A. Yes, sir.

Q. And is loaded by them onto the trucks?—A. Yes, sir.

Q. And then carted away by the employees of the trucking company on the trucks of the trucking company?—A. Yes, sir.

The COURT. Who runs the elevators, the defendant's freight elevators, in taking these things up and down?

The WITNESS. The employees of the building. The operators employed by——

The COURT. The elevator operators?

The WITNESS. That is right; the elevator operators.

Q. Well did you say there was no heat in this building during the elevator strike or building service strike?—A. I was given to understand the boilers were shut down.

The COURT. Were you on strike yourself?

The WITNESS. Yes, sir.

The COURT. Then he does not know anything about it. He was out on strike.

Mr. MERRITT. He testified that way, and I really wanted to be sure.

Q. You do not know whether there was any heat going through the building at that time?—A. Not definitely. Only from hearsay.

Q. What is that?—A. Not definitely. Only from hearsay.

Q. Did you know that the Arsenal Building Corporation had a definite contract with the Automatic Sprinkling Company to handle all servicing and installation of the sprinklers?—A. I believe they have, but I have done some work on it, from time to time.

Q. And did you know also that part of this work of installation, or repair, rather, was done by the Manhattan Engineering Company, an outside corporation, contracted with for that purpose?—A. I have heard the name mentioned around through the building in that type of work. I think they do some of it.

Q. Primarily it is not a part of your duties or the building service employees to take care of the sprinkler system, is it?—A. Yes; it is.

Q. To what extent?—A. To check up on the pressure and water level on the gravity and pressure tanks every morning, and maintain the proper pressures and levels.

The COURT. So that in case there is a fire there will be a sufficient supply of water.

Mr. MERRITT. Yes.

The WITNESS. I have also had to shut down and drain, with the assistance of the superintendent, winter lines, where the cold water would be liable to freeze them up, on the sprinkler system, storage system, and so forth.

Q. So you do not have to do with the sprinkler system for the water people; is that correct?—A. As I stated.

Q. But you do not have to do with the sprinkler equipment itself? The sprinkler equipment itself.—A. Well, to the extent

of maintaining the pressure and packing valves up in the tanks, where the tanks are located on the roof, occasionally.

Q. But only to that extent?—A. That is right.

Q. These toilets and sinks about which you gave some testimony are toilets and sinks in the public halls, are they not?—A. Well, the floor or that part of the floor in which those toilets and sinks are located is not rented by a tenant. Then it becomes private; it is closed off to that tenant. If a tenant has an entire floor they become private to the floor, that tenant.

Q. But generally speaking these toilets and sinks are not in the private premises of the tenants, except where the tenants occupy the entire floor?—A. I do not know, as I would say, generally. It is a big percentage that is private. I do not know exactly what percentage.

Q. But in these places where the toilets and washrooms are as you say private, they are treated in exactly the same way as they are on the other floors where they are public, are they not?—A. As far as I am concerned.

Q. As far as you know?—A. That is right.

Q. You said something about the water boilers of the individual tenants, and gave me the impression that you serviced them. Is that so?—A. The water what, sir?

Q. Water boilers.—A. No; I don't service the water boilers. No.

The Court. What are the water boilers?

Mr. Merritt. It is an attachment used in connection with the manufacture of the garments.

The Court. Did he say that he knew anything about that?

Mr. Merritt. I thought he did, and maybe I am wrong. I noted it, though I may be mistaken.

The Court. I may be, too. I thought he said that he perhaps helped connect——

The Witness. There is only one occasion I can recall that I was sent to try to help a man was having some trouble with his pressing boiler outfit. That is in Wiesen's.

Q. The building supplies heat to these tenants?—A. That is right.

Q. It is part of your duties to keep the radiators in working order?—A. Yes, sir.

Q. As to the electric current and the meter, is it not your understanding that these meters are installed, serviced, and read by an outside metering contractor?—A. That is my understanding.

Q. And is it your understanding that the landlord receives these readings and then bills the tenant for the electrical current he has used?—A. That is the way they bill it.

Q. Is it not a fact, Mr. Silvera, that all these manufacturing tenants maintain and employ mechanics who look after their own machinery?—A. That they all employ them, you say? There are only two concerns in the building that have their own mechanics.

Q. Which are those?—A. Max Wiesen has a mechanic take care of his sewing machines and does general work around, and Mr. Schneck has one.

Q. And the others where there is anything serious happens to the machines send outside for the repair men?—A. In the great majority of the cases.

Mr. MERRITT. That is all, Mr. Silvera.

Mr. ROZEN. I have just two questions, your Honor.

Redirect examination by Mr. ROZEN:

Q. Mr. Silvera, did you ever do any work on the locks of the doors that his Honor so aptly described as dumbwaiter doors in appearance, of the spiral chute?—A. Yes; I have tried to help as I stated before, to make repairs on them and so on.

Q. The other question is, have you ever entered any of the premises of tenants to repair flange bolts on the sprinkler system?—A. Yes; we tightened up some bolts in Mr. Schneck's premises, and also the Atlas Company, there was a drip over the basin and I took up on that and stopped those leaks.

The COURT. Those were just ad interim repairs. Perhaps you would know what I meant. What you have been describing is just something that is done between the calls or work of the people who have charge of the sprinkler system. I do not know what the concern is called, this outside concern that has charge of the sprinkler system, but they cannot have people there all the time and you have to occasionally do something in tying up a bolt or stopping a weeping rivet, doing something or other so as to keep the thing tight until the next time they come around. Isn't that it?

The WITNESS. That is right.

The COURT. I think I understand it thoroughly.

Q. But these slight repairs that you make on the sprinkler system, are they done at the request of the tenant?—A. Well, they report a leak, as I recall, to the superintendent, in Mr. Schneck's case, and he went there with me and we tightened these bolts immediately. It was over a cutting table in that

case. The one down in the print shop I was told about, and I told the chief about it and he told me to go up and I went up and did it.

Q. In respect to the windows for example, or the radiators, is that all done?—A. Yes.

Q. At whose request?—A. The superintendent in most cases—the majority of the cases.

Q. Where does the superintendent, if you know, get the request?

Mr. MERRITT. Of course, he does not know. I object to the question.

The COURT. He could not say unless he heard the request made.

Mr. ROZEN. He reports up there, your Honor, and probably the tenant says "I have been after the superintendent for days" or "after you for days to fix this."

Mr. MERRITT. That would not be proof.

The COURT. No.

Q. Do the tenants ever request you directly, Mr. Silvera, to do these jobs?—A. On occasions. Oh, yes; they do, and I report it to the chief as a general rule. Sometimes he sends in an assistant to relieve—a window or something of that kind if I am too busy to get in and do those things. The work is done in that fashion, and I get orders to do it. If he is not busy I let him do it, and if I get a chance I do it.

Mr. ROZEN. This may be leading, your Honor, but I find it difficult to suggest it in any other way.

Mr. MERRITT. Then do not ask it.

Mr. ROZEN. If it is I will withdraw it.

The COURT. It would be a conclusion of law. Have you got a contract, a personal contract, saying what your duties are, or are you just orally engaged by the superintendent?

The WITNESS. That is all; engaged by the superintendent orally.

Mr. ROZEN. What I mean, your Honor, is that there are many jobs he performs in the building there more or less in the scope of his authority. In the past he has done them, and he knows the superintendent would not object to his doing them again.

The WITNESS. That is correct.

The COURT. Wait, he is talking to me.

Mr. ROZEN. So a tenant would make a request directly to him and he would go ahead and do it without even talking to the superintendent or getting the superintendent's O. K.

The WITNESS. Surely.

The COURT. He is still talking to me.

Mr. ROZEN. The point is he does do these things at the request of the tenants in the normal routine of his job day in and day out. There are a lot of little jobs, but looking at them en masse you can say he devotes all his time to them.

The COURT. He devotes all his time to jobs around the business.

Mr. ROZEN. But I am talking about requests of the tenants. Checking the water tanks, checking the generators or repairing the elevators. But there are certain jobs come to him, and he has to repair because of the tenants' complaints or requests.

The COURT. In all of these things there is a lot of give and take, and there is no great line of demarcation. You could not run a building if you had to try a lawsuit before you had someone go upstairs and shut off a valve. You have to have articulation, a little movement, in life. You cannot possibly have all things cut and dried. I should think that went without saying. He has already testified what he did. I do not think it is necessary to go into it any more.

Mr. ROZEN. That is all for my side, your Honor.

ARTHUR LIPSMAN, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. ROZEN:

Q. Are you employed in the Arsenal Building?—A. Yes, sir.

Q. How long have you been employed there?—A. Well, off and on about 14 years.

Q. In what capacity are you presently employed?—A. Porter.

Q. Porter?—A. That is right.

Q. Will you tell the Court what your duties are, please?—A. Well, I go through the building and clean up, help the other porters clean up, help George Silvera, the assistant superintendent, in various jobs.

Q. What portions of the building do you clean?—A. Well, wherever there is an empty loft or other things to do, I jump in and help.

Q. Do you clean the freight elevator hall?—A. Well, yes.

Q. Do you clean the passenger elevator hall?—A. Well, occasionally, yes.

Q. And any specific floors all throughout the building?—A. Throughout the building.

Q. What about the public lobby on the ground floor; do you clean that?—A. I do not clean that; no.

The COURT. Are you assigned as an assistant to Mr. Silvera? He said there was only one man was his assistant, and that was you?

The WITNESS. That is right.

The COURT. You regard yourself as assistant to Mr. Silvera?

The WITNESS. That is right.

Q. Forgetting for the moment your duties as assistant to Mr. Silvera, will you describe in a little more detail what you do during an active routine day?—A. Well, when Mr. Silvera has odd jobs to do, like fixing windows, putting chains in, I help him, and look after the elevators upstairs, oil, and do other work there.

Q. Do you ever operate an elevator?—A. That is right.

Q. When do you do that?—A. I do that between 5 and 6.

Q. Every day?—A. Every day.

Q. What kind of an elevator?—A. Freight elevator.

Q. Does it have any particular number?—A. Well, that is No. 2 car, I think it is. I don't know.

Q. And you transport merchandise?—A. Yes, sir.

Q. From the ground floor to the floors of the tenants?—A. That is right.

The COURT. I would not use the word "transport."

Mr. ROZEN. All right, operate the elevator, your Honor.

The COURT. Operate the elevator, and on the elevator you take up and bring down merchandise?

The WITNESS. Merchandise.

Q. How do you respond to the tenants' request to take merchandise onto your car?—A. Well, I go down to the floor, and the tenants come in with racks and so forth, and I let them on the car.

By the COURT:

Q. Those little wheeled things?—A. That is right. They have got what they call racks, high racks they put the dresses on.

Q. Yes; and they have wheels below?—A. That is right.

Q. They are pushed in on the elevator?—A. Yes.

Q. How big are these freight elevators?—A. They are quite big. They take five big racks on them.

Q. Are they 5 feet square or 10 feet square, or what?—A. I would not know.

The COURT. It is pretty hard to guess those things exactly.

Mr. ROZEN. Indicate in the courtroom here.

The WITNESS. From here to the end of this table [indicating], and it is just as wide, to this table here. It is quite a large elevator.

Q. Who deals with these racks of dresses, or whatever they are?—A. Well, you see the truckmen bring in them racks and they go to the various floors.

Q. That is, the truckmen of the trucking companies?—A. The truckmen of the trucking companies; yes, sir.

Q. And they handle the racks when they are put on the elevators?—A. On the elevators, and they take them up to the various floors.

Q. And all you do is just run the elevator?—A. Run the elevator.

By Mr. ROZEN:

Q. And the truckman rolls off the rack or push truck, as the case may be?—A. That is right.

Q. Into the elevator hall?—A. That is right.

Q. And pushes it also inside of the premises of the tenant?—A. That is right.

Q. So that he delivers his materials right in the premises of the tenant?—A. That is right.

Q. On the way out, of the merchandise, if you know where does the truckman pick up the merchandise?—A. They pick up from various floors, and they bring it down to the main floor.

Q. They pick it up in the premises of the tenant, do they?—A. From the tenant, that is right, and bring it to the freight hall, and from the freight hall bring it down on the elevator.

Q. Can you describe the sort of merchandise that you take down from the tenants' premises?—A. Well, you take racks of dresses, and we take different merchandise that goes in and out, piece goods and so forth, that goes out of the premises every night and is taken down on the truck, and I do not know what they do with it—deliver it, I suppose.

Q. Do they take materials in any other form than piece goods or dresses on your elevators?—A. Well, cut goods.

Q. What do you mean by cut goods?—A. It is cut on the premises and taken out to different various contractors.

The COURT. I have had so many of these cases in the needle trades, about patents and things like that, I feel very much at home about them.

Mr. ROZEN. I am glad to hear that, your Honor. It will save us a lot of examination, perhaps.

Q. Is there much traffic there in the evening?—A. There is.

Q. Do the elevators manage to dispose of that smoothly?—

A. Well, in a way they do. It takes a little time; it takes about an hour or a half hour sometimes to bring the people down and the truckmen down from 5 to 6.

Q. You say you take people down on the freight elevator?—A. That is right.

Q. Who are these people?—A. From Wiesen's floor and from Schneck's floor, operators, cutters, and so on, come down on the freight elevators from 5 to 6.

Q. Just the operators on Wiesen's and Schneck's floors?—A. That is right.

Q. How about the operators of the other tenants?—A. They do come down, but very few. But the most we get from them two floors.

The COURT. They do that more often, those concerns; is that right?

The WITNESS. Yes.

Q. Have you ever had occasion in connection with your porter work to knock down walls?—A. That is right.

The COURT. Knock down walls?

Mr. ROZEN. Yes, your Honor.

Q. What do you mean by knock down walls, Mr. Lipsman?—A. Well, we are told to go up on ladders with big sledge hammers and break down walls.

The COURT. You mean these plaster walls?

The WITNESS. Plaster walls.

The COURT. I understand what you mean.

Q. What floors are you talking about, Mr. Lipsman?—A. Well, all over the building. That is all over the building. Where the tenant moves out we break up the walls and it is carted out by the truckman.

The COURT. Every new tenant wants to have things arranged a little bit differently, whether a law officer or whatnot.

Mr. ROZEN. That is true, your Honor.

Q. Do you ever move any of the materials, or rather the equipment of the tenants, on the elevators?—A. Sometimes, yes.

Q. Will you describe that, please.—A. Well, in cases where we have got to take from floor to floor a tenant moving out, when we move him from one floor to another, the desks and so forth, safes, from one floor to another.

Q. Does it ever happen that a tenant moves from one part of a floor to another part of the same floor?—A. Well, no; but a tenant will move down from one floor to another, where we have to have two men working to bring them down.

Q. In accordance with your duties as a porter do you help clean the lavatories?—A. I sometimes do.

Q. Those located in the tenants' premises?—A. Well, wherever there is an overflow or something like that, where the water is over the floor, I go in there and mop it up.

Q. This is in the tenants' premises, you are talking about?—A. The tenants' premises; that is right.

Q. Do you help in any way with respect to the rubbish?—A. I do.

Q. And refuse?—A. I do.

Q. In what way?—A. I take from the tenants all kinds of files and stuff and bring it down to the incinerator and burn it up.

Q. What about the regular daily refuse, cutting and clippings and things of that nature?—A. Well, that is taken out by a night man at night; by an individual company.

Q. By an individual company?—A. That is right.

The COURT. What do you mean by an individual company?

The WITNESS. By a regular rubbish man, at night. They take out the stuff at night.

Q. Do you wash any of the floors in the building?—A. I do.

Q. What floors?—A. Well, occasionally different floors. Wherever it is necessary.

Q. Is that in the tenants' premises?—A. Yes.

Q. In the tenants' premises?—A. In the tenants' premises.

Q. On what floors have you worked?—A. I worked on Wiesen's floor, I worked on Schneck's floor.

The COURT. They have several floors?

The WITNESS. Several, that is right. And different other tenants, where the tenants are moving in.

Q. Do you ever repair any fixtures or electrical equipment?—A. No.

Q. Does the tenant Max Wiesen make any use of the freight elevator, exclusive of going down to the ground floor?—A. They do.

Q. Will you explain that, please?—A. Well, they go from floor to floor—from 19 to 18, from 19 to 21, from 18 to 15, where they have got their stock room.

Q. What do they carry?—A. They carry dresses down to the 15th floor, and they have got a stock room down there; they put all their stuff in that stock room.

Q. In other words they put it on the freight elevator and the freight elevator——A. The freight elevator brings it down to the 15th floor to their stock room.

Q. They go in between to the other floors, too?—A. They do.

Q. Do they carry anything else besides dresses?—A. Well, papers, all kinds of cardboards and stuff like that.

Q. What kind of papers, Mr. Lipsman?—A. Well, all kinds of records they bring from floor to floor. They bring boxes from 17 to 21 and from different floors.

Q. Do the employees use the freight elevators in between these floors?—A. They do.

Q. To what degree?—A. Well, they go from 19 to 21, where they can go up, and from 18 to 21, and from 21 down to 18.

Q. Is this use of the elevators a frequent or rare occurrence?—A. Rare occurrence. Once in a while. If they cannot get their little elevator they use the freight elevators.

Q. Is the little elevator—you mean their private elevator?—A. Private elevator.

Q. Is that adequate?

Mr. MERRITT. Aren't you asking for a conclusion?

The COURT. What do you mean by "adequate"?

Mr. ROZEN. I have not finished the sentence.

Q. Is that adequate to take care of the entire traffic for Max Wiesen?—A. You have got to do that.

Q. I mean, do they find many occasions during the day, or don't they? Tell us what the facts are when they find it necessary to use the freight elevators to transport——A. You see, when they are bringing down dresses from 19 to 18 they use the little elevator. Where the people cannot go up from that floor to the next floor they generally ring the bell for the freight elevator and take them up to the different floors.

Q. Do they use the staircases in the same way between the floors?—A. They do.

Q. And the passenger elevators?—A. I do not know about passenger elevators. I cannot tell you about that.

Mr. ROZEN. I think, your Honor, we better take the recess. I am taking longer than I anticipated I would, as always happens, of course.

(Recess to 2:30 p. m.)

AFTERNOON SESSION

ARTHUR LIPSMAN resumed the stand.

Mr. ROZEN. We have no further questions of Mr. Lipsman, your Honor.

Cross-examination by Mr. MERRITT:

Q. Mr. Lipsman, do I understand aright, that all waste, including papers and clippings from cloth, and things of that kind, are removed from the premises of the tenants by an outside concern and carried away as waste?—A. That is right.

Q. Do you happen to know the name of the concern?—A. I do not; no.

Q. Whether it is the Wilson Paper Stock Company?—A. I do not know.

Q. At any rate, that is something done by an outside contractor?—A. That is right.

Q. Employed by the tenants themselves for that purpose?—A. I do not know that.

The COURT. Not probably employed but hired?

The WITNESS. They are hired.

Q. These freight elevators to which you referred, as I understand it, carry goods that come in at the basement and are taken up to the tenants' premises?—A. That is right.

Q. They carry manufactured articles that come out from the tenants' premises?—A. That is right.

Q. They carry materials that are simply cut up and sent out to outside contractors to be made into garments?—A. That is right.

Q. And then when those garments have been made up by outside contractors the same elevators carry them back to the tenants' premises?—A. That is right.

Q. They also at times carry some passengers?—A. That is right.

Q. As a general rule, is it not so that the contractors who make up those garments from the cloths that are cut up are located in the City, or don't you know about that?—A. I know they are sent out of town, but where I do not know.

Q. Is it not a fact that in all ordinary daily operations that the tenants look after the cleaning of their own floors?—A. No, sir.

Q. Do you mean that you or other employees of the Arsenal Company clean up the floors of the tenants day after day?—A. Not day after day, but whenever we are called to do so we have to go in and do it.

Q. But ordinarily it is done by the tenants themselves, is it not?—A. Themselves, yes.

Q. There are exceptions, perhaps, when a lease runs out and a new lease is entered into?—A. That is right.

Q. And in some instances you clean up a floor preparatory to repainting by the landlord, do you not?—A. That is right.

Q. And that is usually at a time when a tenant is moving in or an old tenant is staying on under a renewal lease?—A. That is right.

Q. But generally speaking, during the term of the lease—do you know what I mean by that?—A. Yes, sir.

Q. Isn't it a fact that the tenant assumes the responsibility of taking care of his own premises, including the cleaning of the floors?—A. Well, he does in a way.

The COURT. I don't care what he says, I believe that entirely. I suppose you would have to fix a window if it was broken or things like that.

Mr. MERRITT. Yes; I think that question is too broad.

Q. But generally speaking, during the term of the lease the tenant takes care of his own floors?—A. In a way they do.

The COURT. He does not think they do it very well, apparently.

Q. You do not ordinarily enter into the tenant's premises to clean up their floors during the term of the lease, do you?—A. Well, sometimes I do.

Q. Under what conditions do you do that?—A. Well, tenants that have a lot of waste, like records and stuff like that that they want to burn, we got to come in there and put it on trucks and bring it downstairs and burn it you know.

Q. Where do you burn that?—A. Burned down in the incinerator.

Q. That is an unusual type of situation, is it not?—A. Well, it is done every once in a while.

Q. Then it might happen once a year as to each tenant?—A. Oh; sometimes it is twice a month and sometimes once a month, according to how they want their records burned. They want to get rid of them.

Q. And those records are not covered by the contract of this outside company that comes in and removes the refuse?—A. Well, you see they don't want that contractor to get hold of their records and they burn it up.

Q. So this applies to records which the tenant likes to feel are confidential?—A. That is right.

The COURT. I should say that the records are papers burned up once in a way, whatever that means. I think that is all it means.

Q. The ordinary type of papers are taken away by these outside concerns or contractors in the same way that the clippings from garments are, is that not so?—A. No, sir. Sometimes they leave all the rubbish in the hall where we got to take it down and dispose of it.

Q. So that is where the rubbish is; in the outer hall?—A. In the outer hall; yes.

Q. I don't want to pursue this too far, but as a general proposition, day in and day out, during the term of the lease, the tenant cleans his own floors, does he not?—A. Well, yes; his own lofts. He does that.

Q. Now as to toilets, isn't it a fact that where the toilets are inside the premises of the tenant, where, for instance, a tenant occupies an entire floor, then the tenant looks after

the cleaning of his own toilets?—A. Well, they do, but if there is an overflow of water or things like that, well, we got to go in and do the cleaning. We have to clean up that water off the floor.

Q. That is in case of any emergency which may mean leakage in the building?—A. That is right.

Q. You go in and take care of it?—A. That is right.

Q. But as to the daily keeping up of the toilets, that is left to the tenants, is it not?—A. Well, the private tenants; yes.

The COURT. You mean that for tenants who have private toilets, they take care of them ordinarily, absent from emergency, and then the other, where the public toilets are concerned, the building takes care of that, is that it?

The WITNESS. Yes, sir; that is it.

Mr. MERRITT. And as I understand it, your Honor, there are private toilets merely where the space includes the general location where the toilets are located and where the space does not cover that, they are public toilets.

The COURT. Yes; you take two floors or five floors or something like that and you would have what might be called a plurality of toilets and you would have to take care of them yourself.

Mr. MERRITT. That is all.

CHARLES ANDERSON, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Mr. MERRITT. I understand that each of these witnesses as you examine them may be excused?

Mr. REYMAN. Yes.

Direct examination by Mr. REYMAN:

Q. Where do you live, Mr. Anderson?—A. 5120 19th Avenue, Brooklyn.

Q. Where are you employed?—A. 463 Seventh Avenue.

Q. That is the Arsenal Building?—A. Right.

Q. How long have you been employed there?—A. Sixteen years.

Q. And what do you do there now?—A. I am a freight starter.

Q. Have you always been a freight starter?—A. Yes, sir.

Q. Explain what you mean by freight starter, will you, please?—A. To keep the cars running up and down, the freight cars; load them and see that they get loaded quick.

Q. You are the man who dispatches them?—A. In the freight department.

The COURT. In the freight elevators?

The WITNESS. That is right.

Q. How long have you been a freight elevator starter?—A. About four years.

Q. Where are you located in the building, Mr. Anderson?—A. On the 35th Street side.

Q. And is that on the ground floor?—A. Yes.

Q. That is the street level?—A. Yes.

Q. Is there a public doorway anywhere near where you are and where the elevators are located?—A. No. There is a freight entrance only where the trucks come in.

Q. You are stationed then at the bottom of the elevator shafts, the freight elevator shafts?—A. Yes, sir.

Q. Will you explain just generally what your duties are, what you do when you are there?—A. Well, I try to keep the traffic going up and down as quick as possible and see that the freight gets off and on the elevators, and not too many people get on there.

Q. How many freight elevators are there?—A. Four.

Q. What is the nature of the traffic on those elevators? What is carried on them?—A. In what way do you mean?

Q. What is carried up and down?—A. Well, trucks and racks and different things like that; packages and stuff.

Q. Is it part of your duties to assist in the loading and unloading of those elevators?—A. No; not necessarily.

Mr. MERRITT. I object to that question.

The COURT. Yes; it is a very leading question. Objection sustained. What do you do there? Just supposing I was standing there and watching you start those elevators up and down, what would I see you do?

The WITNESS. Well, you would see me, as soon as one car gets loaded I give him the buzz and tell him to go right straight up, and then if cars are delayed upstairs I have a buzzer downstairs to bring them down; sort of regulate the traffic like.

The COURT. You mean you press a button——

The WITNESS. Yes; and that is contacted on the car.

Q. You mentioned trucks going on the elevators. Who puts the trucks on them?—A. The truckmen themselves.

The COURT. By trucks you mean——

The WITNESS. Dress trucks and like that.

The COURT. When you say racks, you mean the things that frocks are hung on.

The WITNESS. Yes.

The COURT. And when you say trucks, you mean the sort of things that are similar to those little hand trucks they use in the Grand Central Station to carry your luggage on, don't

you? Those where they have a whole lot of luggage piled up, a truck with two wheels and a handle, and then you lift it and it slopes but if you pile the luggage on so it does not sit on, you go on down, is that right?

Mr. REYMAN. I think so.

The WITNESS. Your Honor, they have quite a few different kinds of trucks and they have what you call box trucks and then what you said with two wheels and then they have the racks and flat trucks where they put packages on. The box trucks they put dresses on the same as they do the racks. They hang them on.

The COURT. I see. In fact I have actually seen them going through the streets. That is not attended to by you. You do not do any loading?

The WITNESS. No; no; the truckmen themselves do that. They have helpers, you know.

The COURT. The truckmen are people that come in from outside.

The WITNESS. Outside, and they come down from upstairs, too.

By Mr. REYMAN:

Q. What is your main duty there, Mr. Anderson?—A. My main duty is to keep the hall clear and see that merchandise and stuff gets out as quick as possible.

Q. What are the hours of the day you are there generally?—A. I am there from ten after nine until six at night, not in the hall, though. I am on the car for about two hours during the day.

Q. And what hours are they, generally?—A. From nine in the morning until about half past ten.

Q. All right. From nine in the morning until about half past ten when you are on the cars do you carry trucks with dresses and so on that you have mentioned?—A. I do.

Q. Do you carry passengers on the elevators at any time during that time?—A. I do.

The COURT. When do you run the elevators?

Mr. REYMAN. Your Honor, he testified that he does that two times during the day, from nine until ten-thirty, and I was asking who he carried in the way of passengers at that time.

The WITNESS. And also from about five to six in the evening.

Q. Directing your attention to the hours from nine to ten-thirty, you say you carry passengers?—A. Passengers and trucks.

Q. Now as to the passengers you carry, where do you take them, generally?—A. Well, I use my opinion not to put too many trucks while passengers are going on the cars. I use it just for passengers.

Q. Who are these passengers? Are they the employees of the building?—A. Yes; they are employed by Max Wiesen & Sons.

Q. Do you take them to all floors or what floors generally?—A. 19th—17th.

Q. Do you carry any passengers down in the evening hour when you are on the elevator?—A. Well, now they have changed their hours. They do not get through until six o'clock so I have no necessity of taking them down. When I go home they are just coming down.

Q. What are the busiest hours of the day, Mr. Anderson, with respect to the goods that are coming in and going out?—A. Well, I should say from about three o'clock until about half past four.

Q. In the afternoon?—A. Yes.

Q. Most of them are going in or coming out?—A. Coming in and going out both.

Q. So you have a flow of traffic up and down at all times?—A. Yes.

Q. And you control your elevators from your station down on the ground floor there?—A. Yes.

Q. During the other hours of the day when it is not so busy, is there a steady flow or do the elevator operators have interims of rest?—A. Well, it is some periods that is not as busy as others. They get a little breathing spell like, but when they come they come in droves, in big bunches.

Q. This door that you have described that is on the side street, on 35th Street, is that door on hinges? Is it an open door?—A. Yes; it is on hinges.

Q. Are the doors generally closed?—A. Well, during a cold spell we have them closed for a while, but they are usually open.

Q. And the traffic in and out of the building goes through those doors?—A. Yes.

The COURT. Now wait a minute.

Mr. REYMAN. I am referring to the dress traffic, and so on.

The COURT. Well, then, that sort of answers my question. I got the impression there was a passenger entrance somewhere.

Mr. REYMAN. There is, and that will be brought out.

Q. In addition to that side entrance there, that large door you have described, is there any other method of going in and out on 35th Street?—A. No.

Q. You are familiar with the Railway Express chute?—A. I am.

Q. And how does the Railway Express traffic get in and out of the building?—A. Well, in the morning they bring in the returns and in the hours between about five and six they send out their shippings.

Q. And what door is used for that?—A. That is the same freight door.

Q. Do the Railway Express trucks cross the sidewalk into the building or into the loading platform, or do they remain in the street?—A. They remain right on the street. They don't have to cross the street.

Q. Do the packages come right down the chute and are they put onto the trucks there?—A. Yes.

The COURT. Have you looked at this little plan that was mentioned this morning?

Mr. MERRITT. I have not yet.

The COURT. It was only offered for identification but I wish you would look at it.

Mr. MERRITT. I presume I have no objection to it, but there was so much written matter on it that I thought I ought to look at the written matter.

Mr. REYMAN. We are not concerned with the advertising. The only reason we are offering it is for the plan of the building.

Mr. MERRITT. I have no objection to it going in for that purpose. When I asked Mr. Rozen the question he said he offered it for everything in it.

The COURT. Of course if you just take these two pages, the typical floor plan and the plan of the stores—what do the stores mean?

The WITNESS. Well, there is a sort of cafeteria there.

The COURT. You mean the shops downstairs?

The WITNESS. No; they are stores. There are no shops; no shops on the main floor; only that cafeteria.

The COURT. I really do not see why this should not go in; just this part describing the choice location.

Mr. MERRITT. May I look at it for about sixty seconds. I presume there is no objection.

(Same handed to Mr. Merritt.)

The COURT. We might as well have it in.

Mr. MERRITT. I have no objection to it going in, but the ground floor is not as it is now, my clients tell me. This has been decidedly changed. This is before they became managers of the building.

The COURT. All right. We will reserve it.

By the COURT:

Q. I understood from one of the witnesses there was a steel curtain dropped?—A. Your Honor, that is where the express truck backs in to load there.

Q. I thought you said it did not back in?—A. They do not cross the street here, your Honor.

Q. Don't they have to cross the sidewalk?—A. They do, in through the building. The truck backs right in through the building. They have to back in from the curb into the building.

Mr. REYMAN. This will be helpful to you, your Honor.

Mr. MERRITT. I would suggest that it be received in evidence, your Honor. I have no objection. We will explain the changes that have been made when our witness goes on the stand.

The COURT. Then it will be received in evidence as Plaintiff's Exhibit No. 1.

(Marked "Plaintiff's Exhibit No. 1.")

The COURT. I have just been asking him about something that has not been clear.

Mr. REYMAN. You Honor will notice that freight plan I am told is the same. Then you were asking him about the store.

The COURT. I asked him about those. I was also asking him about the truck, and he said that the truck did not have to cross the sidewalk to get to that door. He said they go right into the building. I said then they must have to cross the sidewalk or curb to do that, and he said they do, they go right into the building. It was not all clear in the evidence given, at least not to me—from this witness, I mean—that the express trucks actually penetrated into the building. That is apparently what they do.

Mr. REYMAN. They do, as a matter of fact.

The WITNESS. They do, your Honor, in the morning.

The COURT. I do not care when they do it, if it happens.

The WITNESS. When they bring the returns. Not in the evening.

The COURT. I do not care when it is, but they can get in. And they have a steel curtain that is locked and comes down outside this entrance?

The WITNESS. Yes.

Q. When it is raised how many trucks can go in?—A. One. One big express truck.

The COURT. That would not be on these plans.

Mr. REYMAN. The freight plan, if I may show your Honor, shows the freight elevators. Here is the doorway, here the

main lobby, and right in here the truck backs in. Right in there [indicating].

Mr. MERRITT. I think I might be of some help. I think this witness has confused the situation.

The COURT. With me he has at least.

Mr. MERRITT. There are two types of entrance. One for the Railway Express and the other for the other trucks. This witness unintentionally put it as one entrance for all trucks.

The COURT. Is that agreed?

Mr. REYMAN. That is a fact; yes. The Railway Express trucks do not back into the same door that your hand trucks and racks go in and out of.

The WITNESS. No; they do not do that.

The COURT. The Railway Express trucks are the only trucks which back inside of the building, aren't they?

The WITNESS. Yes, sir; that is the only one.

By Mr. REYMAN:

Q. Do you still operate the freight elevator in the afternoon, or have you stopped doing that?—A. From 5 to 6 in the evening.

Q. But you do operate it then?—A. I do operate it; yes, sir.

Q. During that time you are operating the freight elevator does someone act as a starter or dispatcher?—A. No; not necessarily.

Q. It is during that time of the day, then, that the employees are coming down on the elevator, did you testify?—A. Between 5 and 6?

Q. Yes.—A. Well, it is probably about 10 after 6 before they use the cars for passengers.

Q. For the passengers?—A. Yes.

Q. Getting away from those particular hours, and just generally during the day, again, do you transport any machinery or anything other than dresses and materials at any time?—A. Well, if the tenant has machines coming in we have got to bring them up. That ain't very often, though.

Q. Anything else you can think of that you transport on the elevators?—A. I don't know, as I remember.

Q. You have been there about 16 years, Mr. Anderson?—A. I have.

Q. Are you familiar with the duties and activities of other employees there in the building, employed by the Arsenal Building or Spear & Company?—A. A little I am; yes, sir.

Q. Do you know whether or not the porters for the building maintain that hallway in which you work to the extent of keeping it clean?—A. Well, my men always do that in the morning.

Q. Who are your men?—A. One of my operators. They clean the freight hall.

Q. In that freight hall there is there ever a bunch or group of trucks or racks in there during the day?—A. There is quite often; yes.

Q. Why are they there, if you know?—A. There is a truckman downstairs has an office down there. He usually accumulates his stuff down there until a truck comes in and he gets it ready to send it.

Q. Are there many racks in there at times?—A. Sometimes quite a few.

Q. Who is this trucking company?—A. Major Trucking.

Q. Where is their place of business?—A. They have a little office down in the building there, in the freight hall.

Q. You say they take goods in and out?—A. Well, they ship piece goods, like.

Q. For the occupants of the building?—A. The different tenants, sometimes.

Q. Do you know whether or not the employees of the Major Trucking Company use the elevators of the building?—A. Whether they use it themselves?

Q. Yes.—A. Well, we take them up with their merchandise and stuff, to bring down their packages.

Q. That is the employees of the trucking company?—A. Yes.

Q. Who makes the repairs on the freight elevators, if you know?—A. The handyman, the electrician.

Q. That is Mr. Silvera?—A. Yes, sir.

Q. Since you have been there there has been a strike or two, hasn't there?—A. What?

Q. There has been a strike or two?—A. Yes.

Q. Do you recall when the last strike was?—A. Well, I cannot be positive, but I think about 1939, something like that.

Q. Which class of employees were on strike at that time; that is, who were they, what did they do?—A. Do you mean in our line?

Q. Were you on strike?—A. Yes; I was.

Q. Were any others of the maintenance employees on strike?—A. The porters and the handyman.

Q. You all belong to the same organization?—A. We do.

Q. And what organization is that?—A. Local 32-B.

Q. Of the Building and Maintenance Employees?—A. Yes; Building Service.

Q. Were you in the building during the time of the strike at any time?—A. I was not. I was outside.

Q. Could you see what was going on back there at the doorway, where you usually work?—A. No; I could not.

Q. Do you know whether or not any of the other employees of the building were working at that time?—A. I presume there was quite a few of them.

Q. I am speaking now of the building maintenance employees.—A. No.

Q. None of them?—A. No.

Q. Do you know whether or not the elevators were running during that time?—A. I haven't the least idea.

Q. Will you explain to the Court, Mr. Anderson, what is generally known as a return of merchandise. A return; will you explain what it is?—A. Well, that is the likes of dresses being shipped different places and they refused them and they are sent back then.

Q. To the building there?—A. To the separate tenants; yes.

Q. Do you know whether or not the elevators transport those returns from the lower floor up to the tenants?—A. They do. The different truckmen bring it in, and expressmen bring it in.

Q. Are elevators running at all times to carry the returns when they come back?—A. They are.

The COURT. Do you mean at all times? You do not mean night and day.

The WITNESS. No; it is up to about 10 in the evening.

Q. Have there been times when returns have arrived there at the building when the elevator is not running?—A. Not that I know of.

Q. Do the returns go up on any particular elevator?—A. It is not necessary. Either car can take them up, provided the car is not loaded.

Q. Any one of them?—A. Yes.

Q. How many starters are there beside yourself, for the freight elevators?—A. Only myself.

Mr. REYMAN. That is all.

Mr. MERRITT. No examination.

Mr. REYMAN. I have one more question, if I may.

Q. I wanted to ask you whether or not you have ever seen any rubbish in the building transported up and down on the freight elevators.—A. I usually see the porters taking it down in the morning, what is left over like accumulations on the floor.

Q. When you say the porters, who employs them?—A. Four or five porters.

The COURT. Do you mean your confreres who were employees with you of the building?

The WITNESS. Yes; your Honor.

The COURT. How many bring the rubbish down, and do they bring it in their arms, in boxes, or crates?

The WITNESS. No; they have sort of a box with wheels on it, and they sweep the floor of all accumulations and bring it downstairs.

Mr. REYMAN. That is all.

The COURT. I thought you had no questions, Mr. Merritt.

Mr. MERRITT. I want to ask some questions, in view of the last question.

Cross-examination by Mr. MERRITT:

Q. Do you know whether this rubbish that you have seen brought down on the elevators was picked up by the porters in the public hall, or whether it was picked up on the premises of the tenants?—A. I presume it was picked up in the public hall.

Mr. MERRITT. That is all.

By Mr. REYMAN:

Q. However, you are quite sure——

Mr. MERRITT. Are you bound to have the last word?

Mr. REYMAN. Well, strike it out. That is all.

HARRY B. SIMON, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. REYMAN:

Q. Where do you live, Mr. Simon?—A. 1613 Amsterdam Avenue.

Q. Manhattan?—A. Yes, sir.

Q. Where are you employed?—A. Arsenal Building, 463 Seventh Avenue.

Q. How long have you been employed there?—A. 16 years.

Q. What do you do now?—A. Run the elevator, a freight elevator.

Q. How long have you operated a freight elevator?—A. 16 years.

Q. That is the only job you ever had there?—A. All I had there.

Q. Will you state to the Court generally what your duties as a freight elevator man are?—A. Well, taking up passengers, taking down freight and taking up freight, at certain hours.

Q. What are the hours now? What are your hours?—A. Well, one week it is 7 to 4, the next week it is 8 to half-past 5—8 to 5, rather; the next week, the following week, it is 9: 30 to a quarter of seven, and the week after that it is 1: 30 to 10: 20.

Q. How many hours a week do you work?—A. 8 hours; 47 hours a week.

Q. What is the kind of merchandise you take up and down?—A. Well, we take up piece goods, dresses, cutting material, up and down all day long.

Q. Do you yourself handle this material?—A. No, sir; all truckmen. We never handle anything; just run them up and down.

Q. Have you worked steadily at the building for these many years?—A. Steady. I don't think I missed three days in 16 years.

Q. Are you a member of the local of the Building and Maintenance Employees Union?—A. Yes, sir.

Q. Do you recall the strike that was mentioned?—A. The last strike?

Q. Yes; the last strike.—A. Yes, sir.

Q. When was that?—A. In 1939.

Q. I don't suppose you worked during the time of the strike?—A. No, sir.

Q. How long did that strike last?—A. I think it was about two days.

Q. Do you know whether or not any of the regular employees of the building engaged in maintenance work worked during that time?—A. No, sir.

Q. Do you know whether or not the elevators were operated during that time?—A. The elevators were shut down.

Q. They were shut down?—A. Yes, sir.

Q. You have been acquainted with most of the employees during the time you have been there, who operated elevators, I take it?—A. Yes, sir.

Q. Do you recall any of them having been dismissed at any time for cause, of your own knowledge?

Mr. MERRITT. I do not think that is material.

The COURT. What is the object of that?

Mr. REYMAN. Perhaps I will withdraw it and put it in another way, to make myself clear, if I may.

Q. Do you know whether or not any building or maintenance employee has been discharged on complaint of any tenant of the building?

Mr. MERRITT. Objected to as incompetent, irrelevant, and immaterial.

The COURT. I sustain the objection. This is not a labor relations case but a Wages and Hours case.

Mr. REYMAN. It is intended, your Honor, merely, and directed only to showing that the tenants do have some degree of control over the tenure of the employees.

The COURT. Oh, a complaint results in action by somebody else.

Mr. REYMAN. We submit to your Honor's ruling.

Q. Who is your immediate superior there, Mr. Simon? That is, whom do you take orders from directly?—A. Well, I take orders from my starter.

The COURT. Is that the gentleman who was just on the stand?

The WITNESS. Yes, sir.

The COURT. And what was his name?

The WITNESS. Mr. Anderson.

Q. Who is generally in charge of the maintenance employees, while you were there?—A. Superintendent Ferdinand. Mr. Ferdinand.

Q. Who employs, the Arsenal Building or Spear & Company, or someone else?—A. Well, I am sure it is Spear & Company.

The COURT. I do not think really that is the way to prove whom he is employed by.

Mr. MERRITT. You are not trying to establish that these are the employees of Spear & Company, are you?

Mr. REYMAN. No, sir; I simply want to show the setup within the building, according to the employees' own ideas.

Mr. MERRITT. I believe that we will concede that in the selection of the employees Spear & Company acts as agent for the Arsenal Building.

The COURT. And they pick out these people.

Mr. MERRITT. And pick out the men.

Mr. REYMAN. That is fine.

The COURT. And probably the superintendent, if he has reason for doing so, would discharge an employee; is that right?

Mr. MERRITT. Yes, sir. The superintendent actually does the hiring, as I understand it.

The COURT. The superintendent actually does the hiring?

The WITNESS. That is right.

The COURT. And Spear & Company decides who is to be hired, do they?

Mr. MERRITT. Well, the superintendent would be selected by Spear & Company for the Arsenal Building, and the superintendent in the ordinary course of affairs would decide who would be hired or dismissed.

The COURT. All right. Then he is paid by the building and not by Spear & Company?

Mr. MERRITT. Right, sir.

Mr. REYMAN. Then that is sufficient.

The WITNESS. The superintendent pays us a salary.

The COURT. A salary by the building, the Arsenal Building.

The WITNESS. That is true.

The COURT. So you get that difference between the informal point of view all of us have about things and the real point of view.

Mr. REYMAN. Precisely.

The COURT. The real point is that Spear & Company may be the agents of the building and may employ the superintendent, and then the superintendent's salary is paid by the building and he engages and discharges the men who are employed.

Mr. REYMAN. That is right; and your Honor has in mind the definition of "employer" as contained in the Act. That is my only purpose, to show the relationship as it actually does exist and the relationship as it must exist under the purview of the statute.

The COURT. What is the definition of "employer?"

Mr. REYMAN. It is rather broad, your Honor, in Section 3 (d) of the statute. "Employer includes any person acting directly or indirectly in the interest of an employer in relation to an employee, but shall not include the United States" and so forth. That is all.

Mr. MERRITT. Don't you want to change his testimony from 47 hours to 46 hours as the time he works?

Mr. REYMAN. How many hours do you work a week?

The WITNESS. 47.

Mr. REYMAN. 47 the witness says, Mr. Merritt.

Mr. MERRITT. Well, we will correct it later. No cross-examination.

The COURT. He said 47 hours a week.

Mr. MERRITT. That is what he said, but I think he is wrong.

Mr. ROZEN. We have the pay-roll records here.

The COURT. Let us not go into that now.

HARRY BLUM, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. REYMAN:

Q. Where do you live, Mr. Blum?—A. 392 East 4th Street, Brooklyn.

Q. And where are you employed?—A. 463 Seventh Avenue.

Q. What is the nature of your employment; what do you do there?—A. Passenger elevator operator.

Q. How long have you been a passenger elevator operator?—A. About two years.

Q. What are your hours of work usually? Your daily hours of work.—A. Well, it is an 8-hour day, but we have different—we switch around, in the hours, every week.

Q. There is an early shift and a late shift?—A. Yes.

Q. But it all is during the daylight hours, is that generally true?—A. That is it.

Q. Is there a starter in the lobby of the building there?—A. Yes, sir.

Q. And the entrance to the passenger elevators, the lobby, fronts on which street? How do you get into the lobby where the freight elevators are, from which side?—A. To the freight elevators?

Q. I mean the passenger elevators, excuse me.—A. Well, the main entrance is on Seventh Avenue, and runs oblong into the building; then we have another entrance on 35th Street.

Q. So you can get into the lobby by two different doors?—A. That is right.

Q. Do you ever carry freight on the passenger elevators?

The COURT. Ever carry what?

Mr. REYMAN. Freight, merchandise, packages.

A. Packages we carry.

Q. What kind of packages do you carry?—A. They are single packages. No heavy freight.

Q. Who generally has them? Are they put on there? Are they in your custody or the custody of someone else?—A. Individual buyers.

Q. Are you generally operating the car, or do you have periods of waiting for passengers during the day?—A. There might be a full minute waiting and sometimes 20 seconds.

Q. Generally speaking and compared to the average building, are you busy or not busy? Are they busy freight elevators?

Mr. MERRITT. I object to a comparison with the average building.

Mr. REYMAN. Let me rephrase it, then.

Q. The Arsenal Building is a loft building and contains tenants engaged in the manufacturing of dresses; is that true?—A. That is so.

Q. And you have been in other buildings of similar size, I take it, in that section of the city?—A. I have been in them but never worked.

Q. Have you at any time watched the elevators in any other buildings to see how frequently they run, how many there are, and so on?—A. I never took any particular notice.

Q. I see. All right. Are dress racks ever carried on the passenger elevators?—A. No, sir.

By the COURT:

Q. How many passenger elevators have you got?—A. Five.

Q. How big are they, just roughly speaking? Do you know how big they are?—A. How big?

Q. Yes; how big are they?—A. 5 by 6 or 7.

Q. You say they are much smaller than the freight elevators?—A. They are smaller.

By Mr. REYMAN:

Q. Are there any directional signs to show which tenants are on particular floors?—A. Yes, sir.

Q. Where are those signs located?—A. They have one big directory in the main lobby, then they have individual directories in each car.

Q. In each car?—A. Each passenger car.

Q. For the floors, the different floors?—A. Yes.

Q. Is there any other marking on the elevator door or otherwise to show which floors the tenants are on?—A. As you land on any landing the names of the firms are on that door.

Q. Are on the inside of the door?—A. Are on the inside of the door, facing the passenger.

Q. So the person on the elevator can read it without getting off?—A. That is right.

Q. What kind of business, if you know, are the people generally engaged in that you carry up and down in these elevators; who are they?—A. Silk salesmen, different buyers.

Q. They are persons transacting business with the tenants?—A. That is right.

Q. How do you know that, Mr. Blum?—A. Well, we have these people, the same people, pretty near every day. That is silk salesmen. And we get to know the buyers pretty well ourselves.

Q. Do you know whether or not many of them are out-of-town buyers, that they come from other places?

Mr. MERRITT. Do you know?—A. I cannot say.

Mr. REYMAN. That is fair enough.

Mr. MERRITT. Fair enough, but I was afraid it might not be fair.

Mr. REYMAN. That is all.

Mr. MERRITT. No cross-examination.

GERHARD HEEDER, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. ROZEN:

Q. Where do you reside, Mr. Heeder?—A. 550 East 134th Street, Bronx.

Q. Where are you employed?—A. 463 Seventh Avenue.

Q. In what capacity?—A. Porter.

Q. Will you describe what your duties are as a porter, Mr. Heeder, please?—A. I have certain floors to clean and stairways and we relieve on the freight elevators.

Q. What floors are assigned to you, Mr. Heeder?—A. Six down to the second, and the mezzanine floor.

Q. And what are your duties in connection with those floors, from the mezzanine up to the sixth?—A. We sweep it in the morning and we clean the toilets and we take down all the garbage and stuff we find on the floors and burn it up, and if it is too much to take down we tie it up and leave it there in the hall, for the garbage man to take.

Q. Where do you burn it?—A. Down next to the boiler, in the incinerator.

Q. And when you say garbage man, whom do you mean by that?—A. Well, I guess the fellow who is supposed to take the paper and stuff away.

Q. Is that the refuse, the clippings and so forth?—A. No clippings, no. They are paper boxes.

Q. Paper boxes that the tenants have thrown out into the freight elevator entrance?—A. In the hall, in the freight hall—not the freight hall, the certain halls where we work.

Q. Is there much or little of this refuse?—A. Much.

Q. And is that true of all the tenants?—A. Yes, sir.

Q. Do you wash the floors?—A. Yes, sir.

Q. When do you wash the floors?—A. Whenever we get time.

Q. Every day?—A. Some every day.

Q. Do you also have charge of the staircases?—A. Yes.

Q. There are staircases, are there, between every floor?—A. Yes, sir; three of them.

Q. Three staircases connecting each floor?—A. Yes, sir.

Q. Who uses those staircases, if you know?—A. The tenants and truckmen.

Q. Truckmen too?—A. Yes, sir.

Q. Do you clean the staircases as well?—A. Yes, sir. And put in the lights.

Q. Put in what?—A. The lights.

The Court. If a bulb goes out, you replace it?

The Witness. Yes, sir.

Q. Are there any Railway Express men located for any part of the day on any floors that you have charge of?—A. There is on the fifth floor a desk next to the chute where they shoot down them boxes and he uses the desk to write out his slips, I suppose.

Q. How much of the day is devoted to that desk by the Railway Express man?—A. I could not tell.

Q. Is it a half a day or whole day?—A. I would not know.

Q. How frequently do you see him there every day?—A. I see him every day, yes, but not always on the fifth floor; sometimes on the fourth and sometimes on the third.

Q. Where does he get his desk?—A. He puts it in the hall.

Q. That is in the freight elevator hall, is it?—A. Yes, sir.

Q. He uses it as an office, is that it?

Mr. MERRITT. Oh, I object.

Mr. ROZEN. I did not mean to lead the witness, your Honor.

The COURT. Oh, yes; but what difference does it make? Objection sustained. It is just a waste of time.

Mr. ROZEN. I wanted to show, your Honor, that the Railway Express man uses a portion of the freight elevator floor, sometimes the fourth and sometimes the fifth, and that floor is cleaned and lighted and heated by the maintenance men and employees of the building.

The COURT. Yes, I have heard all of that before.

Q. In addition to your duties as a porter, do you do any other things in the building?—A. Well, if the chief tells us to do something, we do it.

Q. Will you describe your regular duties outside of your porter duties that the chief tells you to do?—A. Well, most of the time we clean floors in order to put down new linoleum, maybe.

Q. Clean floors where?—A. Well, in some showroom or in some storeroom.

Q. In premises that have been leased to a tenant, you mean?—A. Yes, or else he will send us—I mean Mr. Ferdinand—to paint something, mostly floors, and once in a while walls too, or we break down some partition or wall or showcase or something like that.

Q. Do you do any other work besides that porter work?—A. Well, we relieve on the cars every day.

Q. You do?—A Yes.

Q. At what hours?—A. Between eleven and twelve.

Q. What cars do you refer to?—A. The freight cars.

Q. That is every day in the week, is it?—A. Every day, and once two hours on Friday.

Q. When do you do two hours on a stretch?—A. On Friday.

Q. These alterations that you described, knocking down walls, at what points in the tenant's occupancy are they made?—A. Well, with a small tenant I would say only when they move in or move to a different location, but the bigger ones they will call us any time they have something to do.

Q. You said that you cleaned the lavatories in the building?—A. Yes, sir.

Q. Will you describe where those lavatories are located that you actually cleaned?—A. They are located in the public hall on each end of the building—the west and the east.

Q. Are any of them located inside of tenants' premises that you clean?—A. Not from the building; no, sir.

Q. Have you ever cleaned any of the lavatories or worked inside the premises in that respect, the premises of a tenant?—A. In my own time; yes, sir.

The COURT. "On my own time" you mean?

The WITNESS. On my own time.

The COURT. They gave you something extra?

The WITNESS. They give you one hour lunch, and if you have something to do, they give you something extra for it.

Q. How long have you been there, you say?—A. About fifteen months, I think.

Q. Do you ever act as a fireman?—A. No, sir; I burn stuff, that is all, but not to make steam.

Mr. ROZEN. That is all, your Honor.

Cross-examination by Mr. MERRITT:

Q. During this period of fifteen months what have you been called upon to do by your employer for some large tenant in the way of fixing up the floors or changing partitions and so forth?—A. Removing oilcloth, cleaning floors, painting floors and knocking down walls.

Q. Now give me the name of the tenant?—A. Wiesen & Sons.

The COURT. That is the one we have been hearing about?

The WITNESS. Yes; and Max Schneck, and there is a guy on the third floor, Kaplan & Elias.

The COURT. Are they big tenants?

The WITNESS. Well, they have got a half a floor.

Q. What did you do for Kaplan & Elias, and when?—A. Well, Kaplan & Elias, they had a rush job of laying down linoleum in the showroom so we had to soak it with water and scrape it after; dry it up again in order so the linoleum could be laid right away.

Q. Were they making any changes in those premises at that time?—A. No, sir; just to the floor covering.

Q. How long had they been a tenant?—A. I could not tell you, sir.

Q. What time of year was it?—A. That was about a month ago, or two weeks ago.

Q. Was it when their old lease was expiring?—A. I do not think so, but I do not know.

Q. Now, what did you do for Wiesen?—A. Well, for Wiesen we cleaned up many a time and we knocked down walls, and we did the same work I just described, and we moved stuff around.

Q. And you did this all during the time you were employed by the Arsenal Building Company, or did you get specially paid for it by Wiesen?—A. No, we did not get specially paid. We got a tip, but I did not consider that specially paid because it was too little for that.

By the COURT:

Q. Was it on your office time, so to speak? You did not do that on your own time?—A. I did it on the boss' time.

Q. And they gave you a little tip?—A. Yes.

Q. So you have been paid by the boss for the time?—A. Yes, sir.

By Mr. MERRITT:

Q. Who directed you to do that?—A. My chief, the superintendent, Mr. Ferdinand.

Q. How long ago was it that you last did work of that kind for Wiesen?—A. I do not know. I would not know. It was inside of this one year I am there, or one and a half years.

Q. Was some of that work being done when the arrangement on the rooms was being changed?—A. Yes; some of the work when Wiesen took his son's part of the 21st floor and then again when they took the whole floor, the same floor, the 21st.

Q. And you did this work to get the new premises in shape for Wiesen to occupy?—A. Yes, sir; some, and some to get his shop in shape and his showrooms and stuff.

Q. Was it all done at about the same time?—A. No, sir. There was a period in between. I do not know how long.

Q. What did you do for Max Schneck?—A. Cleaning up, and we painted some and we did some of the same floor work, you know.

Q. Was that during the period of his lease or when his lease had expired?—A. Well, once I knew it was not expired, and the last time I would not know. He gave up a floor, or half a floor, or something like that.

Q. And in all of those instances you were not paid by the tenant except that he may have given you a tip?—A. Yes, sir.

Q. And in all of those instances you did the work during your regular hours, and were employed by the Arsenal Building Company?—A. Yes, sir.

Q. Do you recall that Max Schneck gave up half a floor?—A. Yes, sir.

Q. Did you do this work at about that time?—A. Some of it I did, yes, sir.

Q. Most of it?—A. Well, even most of it; yes, sir.

Q. And that was work done in connection with an effort to make the reduced premises suitable for his use, wasn't it?—A. Not only his reduced premises, but the ones he occupied also.

Q. But it was all in connection with those changes involved in the space he was taking?—A. One floor was the 11th and one was the 12th.

Q. And on which floor did he give up half a floor?—A. The 12th, but we worked also on the 11th, right on his present premises.

Q. Were there changes being made in his occupancy on the 11th floor?—A. I do not think so.

Q. You mean that each room was being used for the same purpose that it had been used before?—A. I would not know. I only know we worked in his passenger hall. He put out some showcases and we had to knock out and paint.

Q. But so far as you know when he reduced his two floors to a floor and a half it may have been involved in his particular space he was using on the 11th floor? A. It may be.

Redirect examination by Mr. ROZEN:

Q. One more question: my associate reminds me I did not ask you whether all the porters relieved the freight-elevator men?—A. All the porters but the front hall porter.

Q. And what is his name?—A. Jay Garcia.

Q. He does not relieve the freight elevator men?—A. Not on the freight cars.

Q. Does he relieve on the passenger cars?—A. Not relieve. He takes it for a half an hour or so, I think.

Q. Do you think or do you know?—A. That I know.

Q. He does work on the passenger elevators a half an hour each day?—A. Or it may be an hour.

Q. Does he have any special duties when he works on this passenger elevator?—A. No, sir; not that I know.

Mr. ROZEN. Thank you.

(Short recess.)

ELI DAVIS, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. REYMAN:

Q. Where do you live, Mr. Davis?—A. 129 Shearman Avenue, Manhattan.

Q. And you are employed at the Arsenal Building, are you?—A. 463 Seventh Avenue.

Q. What do you do?—I am assistant starter.

Q. Assistant starter of the freight or the passenger elevators?—A. The passenger elevators.

Q. And where is your station in the building?—A. I stay on the main floor, in the lobby.

Q. And there are two ways to get into the building?—A. Two ways.

Q. Two where you stand?—A. Yes, sir.

Q. Do the passenger elevators go below the floor on which you stand?—A. Two of them; just two.

Q. And where do they go?—A. The basement, and two—we have two cars go to the basement, and they go to the office, what we call, on the roof.

Q. And that is the office of Spear & Company?—A. Yes, sir.

Q. Do the stairways in the building come out in that lobby?—A. One stairway comes to the lobby; yes, sir.

Q. And that one stairway runs to the upper floors—all of them?—A. I suppose so. You see that is not my business.

Q. So far as you are concerned, there is one doorway to one stairway?—A. One stairway comes to the lobby. The other stairways I do not know anything about.

Q. Do you know who keeps that stairway clean?—A. I do not know. My business is to run the elevator and be a starter.

Q. In addition to passengers carried on the elevators, the passenger elevators I am speaking of, is anything else carried? Merchandise and packages?—A. Well, this is the only thing I see, if people coming in with boxes—not big boxes—little boxes. I do not know what they got or what they do because we are not supposed to ask those questions.

Q. The boxes you see brought in by people are usually carried by one person, is that so?—A. One person; yes.

Q. Do you have anything to do at all with the freight elevators?—A. No, sir.

Q. Can you say whether or not merchandise is carried upstairs through the stairway you have mentioned?—A. No, sir; I do not know. I am in the front at the passenger elevators.

Q. Can you see the door from where you stand?—A. I see the door but I do not see anybody go away and go in with merchandise.

Q. You do not see any?—A. No, sir.

Q. What was your last answer, Mr. Davis?—A. I do not see anybody come down—what do you mean? Trucks or things?

Q. No; I am trying to ask you whether or not that stairway there that comes into the lobby——A. Yes.

Q. ——is used frequently for the passage of merchandise?—A. No; there is no merchandise goes through there. People goes up to the second floor or third floor, walking up there, and probably have a little box, you know. That is, some people are rushed and they want to go right up, and if the elevator is not on the main floor they walk up, that is, to the second floor. I do not mean they go to the 22nd.

By the COURT:

Q. Is this the floor I am showing you here [indicating on diagram]?—A. I understand. I stand in the main lobby, your Honor.

Q. Is this the main lobby opposite the passenger elevators?—A. That is the main lobby and the passenger elevators.

Q. And this is the staircase you are talking about to the left as you face the passenger elevators?—A. I did not talk about that stairway, but he asked me. I do not understand that part. I only said I was assistant starter and run the elevator during the reliefs.

Q. On which side do you stand?—A. When I stand, they stand on my left hand.

Q. That is the staircase?—A. The staircase; yes, sir.

Q. When you start these elevators of course you face the elevators?—A. I face the elevators.

Q. Are two of you engaged in running these passenger elevators? You said you are an assistant.—A. I am an assistant, and there is a man above me, which is the starter, and I am taking orders from him. I do relief like. I relieve him and I relieve the operators for lunch or recess.

Q. You mean run the elevators?—A. Run the elevators and then assistant starter.

Q. You have a perfectly enormous traffic in the elevators, do you not?—A. Yes; we have quite a traffic.

By Mr. REYMAN:

Q. Mr. Davis, are you called upon from time to time to answer questions asked by people coming into the building?—A. Yes, sir.

Q. Do they ask you about the businesses of the various tenants and for direction to the several floors?—A. Well,

people that come in in a hurry have asked me what floor is so-and-so, the tenant, and so this is a part of my business there, to tell them and say the 12th or the 13th or the 15th and so on, and I tell them that and that is all.

Q. Do you know the business of any of the people who come in there and that use the elevators?—A. Well, I presume they are buying something or selling something, because it is a garment building.

The COURT. I should think that is a a safe guess.

Q. Do any of the people that come in there ever ask you about manufacturers with particular price lists or——

Mr. MERRITT. I object to that question as incompetent, irrelevant, and immaterial.

The COURT. Particular price lines?

Mr. REYMAN. Yes; price lines carried by the several tenants; whether or not any questions are ever directed towards that.

The COURT. I cannot conceive of the relevancy of that. I sustain the objection.

Q. How long have you been there, Mr. Davis?—A. I am there since 1928—about twelve years.

Q. And you have known a number of the other elevator operators and porters there during the time you have worked there, no doubt. Do you know of your own knowledge whether any employee, elevator operator, or porter or maintenance man was discharged on a complaint of any of the tenants?

Mr. MERRITT. Objected to as incompetent, irrelevant, and immaterial.

The COURT. Objection sustained.

Mr. REYMAN. That is all.

Mr. MERRITT. No cross-examination.

Mr. REYMAN. If the Court please, we have asked the other side to produce and have here what are conceded to be, I assume, pay-roll records of the Arsenal Building Corporation. We have them here for the year 1941 so far, and also 1938 and 1939. The authenticity of the records are admitted, I assume.

Mr. MERRITT. Oh, no. You will have to put a witness on.

Mr. REYMAN. You want them proved?

Mr. MERRITT. Yes; but I won't be technical about it. We have been accommodating and gave you the material in advance, so that you could look it over and question about it, but we do not concede there are admissions. You will have to put a witness on the stand.

Mr. ROZEN. Why cannot we put Mr. Spear on the stand. He can authenticate them, or Mr. Ferdinand.

Mr. REYMAN. I will call Mr. Ferdinand.

JOSEPH FERDINAND, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

(Folders marked "Plaintiff's Exhibits 2 and 3" for identification.)

Direct examination by Mr. REYMAN:

Q. Where do you reside?—A. 8907—247 Street, Bellerose, Long Island.

Q. What is your occupation?—A. Superintendent.

Q. Of what?—A. 463 Seventh Avenue.

Q. Who is your employer?—A. Arsenal Building Corporation.

Q. You are in charge, are you not, of the maintenance men, that is, the elevator operators and porters?—A. Yes, sir.

Q. Handymen and electricians?—A. All the help of the building.

Q. The maintenance employees?—A. That is right.

The COURT. How long have you been superintendent?

The WITNESS. In that particular building ever since it was opened, sixteen years ago.

Q. Do you keep records concerning the hours, wages, and other data concerning these maintenance employees?—A. I do.

Q. I show you certain documents marked Plaintiff's Exhibits No. 2 for identification and No. 3 for identification, and ask you whether or not these sheets are prepared by you or under your supervision?—A. By me.

Q. Prepared by you personally?—A. Yes, sir. Here is my signature [indicating].

Q. And you have signed each one of the sheets?—A. Each one.

Q. In each one of the two folders?—A. That is right; yes, sir.

Q. And the records on there are the complete and accurate records of the hours and wages of the several employees whose names appear thereon for the periods shown?—A. That is right.

Q. Do you want to look at them?—A. No, sir; that is my handwriting.

The COURT. What periods are shown on them?

Mr. REYMAN. We have here for the year 1940 and part of the year 1941. Those are Plaintiff's Exhibits 2 for 1940, and 3 for 1941, for identification. A number of ledger sheets are

bound in these folders which I suggest ought to be numbered through for the purpose of the record.

The COURT. What do you mean by numbered through?

Mr. REYMAN. I think we ought to identify the number of sheets.

The COURT. Count them. I don't want to have a separate number for each sheet.

Mr. REYMAN. But the binders ought to show the number of sheets.

The COURT. All right. How many sheets do they contain? I suppose one for every week.

The WITNESS. Two, sir.

The COURT. There ought to be 104 if I know how to calculate.

Mr. REYMAN. That would be for Exhibit No. 2, and there are 20 sheets in Exhibit No. 3. They are offered in evidence, if the Court please.

Mr. ROZEN. I thought your Honor said this morning you wanted the pay-roll records in evidence. We have 1938 and 1939 and we are not offering them because we thought perhaps——

The COURT. I don't know what you want to do but I thought the pay rolls ought to be a part of the evidence because that is one of your points.

Mr. ROZEN. Yes; your Honor.

The COURT. The number of hours they worked and what they got paid.

Mr. ROZEN. Yes.

The COURT. They have breached the ultimate limit of minimum pay now, haven't they? At the present time? The highest minimum pay required by the statute is enforced as against such employees as may be subject to the Act?

Mr. REYMAN. That is true. There was a minimum of 25 cents required in 1938 up to 1939. So now they are receiving 30 cents and the 30 cents will stand until seven years after the effective date of the Act unless changed by Congress or an applicable wage order, but after the expiration of the seven years from the effective date the minimum becomes 40 cents.

(Folders marked "Plaintiff's Exhibits 4 and 5" for identification.)

The COURT. Are those others all right?

Mr. MERRITT. Yes. I have made no objection.

(Plaintiff's Exhibits 2 and 3 for identification received in evidence.)

Q. Now, Mr. Ferdinand, I show you Plaintiff's Exhibit 4 for identification, purporting to be records covering the year 1938 of the wages and hours and other information relating to the employees of the Arsenal Building, and ask you whether or not you prepared those records?—A. I did; yes, sir.

Q. And they are the authentic records of the corporation for those employees?—A. Yes, sir.

Q. And you were charged with the duty of preparing them?—A. Yes, sir.

Q. I show you Plaintiff's Exhibit 5 for identification, covering the year 1939 and ask you whether or not those are the true records for the same purposes as to those employees?—A. Yes, sir, they are.

Mr. REYMAN. They are offered in evidence, if your Honor please.

(Plaintiff's Exhibits 4 and 5 for identification received in evidence.)

Cross examination by Mr. MERRITT:

Q. Some testimony has been offered here as to some of the building service employees of the Arsenal Building, to the effect that they have cleaned floors and helped lay linoleum and knock down walls, in connection with the leased premises of some of the tenants. Can you tell us under what circumstances your employees do that work?

Mr. ROZEN. Do I understand, your Honor, he is making him his own witness now?

The COURT. That makes no difference now under the present rules. Anyway this is a convenient way to do it.

A. We do that to make alterations, in renewal of leases. Such as knocking down partitions, cleaning floors and so forth.

Q. Will you tell us just the routine, as to the way in which you do that? Does it have to come by direction from you, or how is it done?—A. Well, when I am told by the office, Spear & Company, just what we intend to do to that loft, I issue orders to my help to go ahead and do it. That is as to cleaning and knocking down partitions.

Q. Would that apply to the laying down of linoleum?—A. Not laying linoleum. I mean they never lay linoleum.

Q. It would apply to cleaning the floors in the premises of the tenants?—A. That is right, before the tenants move in; yes sir.

The COURT. What they said about laying linoleum was a little bit equivocal. It might have meant that they cleaned the floors before the linoleum was laid and it might have meant they were laying the linoleum. Of course, you would

have to have the floor pretty clean to lay linoleum, otherwise the slightest unevenness or piece of dirt would cut by degrees through it.

Mr. MERRITT. I rather gather you have the right answer.

Q. So far as your knowledge is concerned you have never known any of your employees actually laying linoleum for any of the tenants?—A. No, sir.

Q. Have you ever known of your employees cleaning the floor preparatory to the laying of linoleum by the tenants?—A. No, sir.

The COURT. Of course, these people would want to put the linoleum in themselves, and I think it is most unlikely that a person of just ordinary experience would take part in the laying of it, as it would have to be done right to have it flat. I do not think it is very material, anyhow.

Q. Have you known of any instance where your employees have cleaned the floors of any of the leased premises except on orders received from you?—A. Well, I don't know of any instance at all.

The COURT. You would not be apt to, I guess.

The WITNESS. I guess not.

Q. Do you mean by that that it would be contrary to the rules and regulations of the building for your employees to clean floors without directions from you?—A. Yes, sir.

The COURT. Are you through?

Mr. MERRITT. With that particular point, yes.

The COURT. Is there a caesura so I could ask a question?

Mr. MERRITT. Yes, sir.

By the COURT:

Q. I would like to ask you one or two things. There has been put in evidence a little folder about the Arsenal Building which contains the customary handsome architecture, etc., and ground plan. Am I to understand this is on the northeast corner of 35th Street and Seventh Avenue?—A. That is correct; yes, sir.

Q. That means you do not occupy the whole block?—A. No, sir; not the whole block.

Q. It says 200 feet on 35th Street and 98 feet 9 inches on Seventh Avenue.—A. That is correct; yes, sir.

Q. The reason I ask you these things is because I want to get a picture in my mind how the people come in. The main entrance as I understand it is this doorway shown in this picture in the middle of the building on Seventh Avenue.—A. Yes, sir; there is also a side entrance on the street.

Q. I was going to say there is also a side entrance which is over on 35th Street?—A. Yes, sir.

Q. In addition to that there is beyond a place where you can bring in freight from 35th Street?—A. That is right, there is an entrance there for freight.

Q. As I look at this picture it shows also where the spiral chute is. You know what the spiral chute is, of course?—A. Yes, sir.

Q. The spiral chute from its position here I would say seems to be on your left-hand side if you were facing the freight elevators?—A. Yes, sir; correct.

Q. Where is the entrance in which the American Express Company trucks come to avail themselves of the use of that spiral chute?—A. It is a separate entrance entirely; a driveway.

Q. Is it on the floor below?—A. No, sir; it is on the main floor.

Q. Can you show it to me here?—A. Yes, sir.

Q. Do not mark it.—A. The spiral chute is here. That was widened some time back. This is the fire tower stairs coming down, and the express runway is right in here. Of course, that is before——

Q. Yes; I understand it was formerly owned by another company before you bought it.—A. Yes, sir.

Q. So the express runway is——A. West of the freight hall now?

Q. West of it?—A. Yes, sir.

Q. Just west of the main freight hall?—A. That is right.

Q. The express trucks would come in here at 35th Street?—A. 35th Street; yes, sir.

Q. There would be room for one truck to back in?—A. That is all.

Q. Can it back all the way in so that it is off the sidewalk?—A. Yes, sir; backs all the way in.

Q. Then there is a chute, and it can back far enough in to get in contact, can it, or near the chute?—A. Yes; there is a little platform, and from the platform to the mezzanine floor it is open. It is about 6 or 7 feet. There is just a little drop.

Q. I was just wondering where the passenger elevator is.—A. That circles around the passenger cars. The building is practically 100 feet deep, and the runway goes deep.

Q. So when you go in you go around the passenger cars, and you have to back out around the passenger cars?—A. No, sir; there are passenger cars in back of that yet.

Q. Yes; that is right. So this is not the mezzanine I see here?—A. No, sir; the fire tower stairs coming down.

Q. This is the first floor?—A. That is the first floor; yes, sir.

Q. So all the elevators go down to the mezzanine; all go down to this floor?—A. Freight cars only go to the mezzanine. The passengers do not stop at the mezzanine. There is no connection by the passengers with the mezzanine floor.

Q. There is no connection between the passenger elevators and the mezzanine floor at all?—A. No, sir.

Q. And the passengers cannot get off there?—A. They cannot get off there.

Q. They have the spiral chute here, but this is the main floor and the spiral chute stops at the mezzanine, does it?—A. It stops at the mezzanine; yes, sir.

Q. The spiral chute goes down from the mezzanine—to the mezzanine, and when the American Railway Express trucks come in I suppose they usually back in, don't they?—A. They back right in; yes, sir.

Q. They back in and get into a position where there is another little chute that curves around?—A. Just a drop. Just a slight drop.

(Adjourned to Tuesday, April 1, 1941, at 11 o'clock, a. m.)

NEW YORK, *April 1, 1941.—11 o'clock a. m.*

TRIAL RESUMED

Mr. MERRITT. If it will be of any help to your Honor, here is a diagram that was prepared by some of the people having to do with the defendant's building, and I understand the counsel for the Government are glad to have it offered.

Mr. REYMAN. Perfectly agreeable. I should like to have it in.

The COURT. That is one I was talking about yesterday in reference to the chute and other things?

Mr. MERRITT. Yes.

The COURT. It represented what it was formerly, under different ownership.

Mr. MERRITT. This represents the present condition of the building.

The COURT. The witness can testify to that and it may be a very good thing to have it in.

Mr. MERRITT. Yes; I suppose he can.

The COURT. I do not know whether he can read such a sketch or not, but I guess he can.

JOSEPH FERDINAND resumed the stand.

Cross examination resumed by Mr. MERRITT:

Q. Examine that diagram of the ground floor and mezzanine floor of 463 Seventh Avenue, and see if that correctly represents the layout [handing sketch to witness].—A. That is correct.

Mr. MERRITT. I will offer this diagram in evidence.

Mr. REYMAN. No objection.

(Marked "Defendants' Exhibit A.")

Q. You will note on Defendants' Exhibit A where I have blocked out certain space with my lead pencil. Does that indicate where the toilets were once located?—A. Yes.

By the COURT:

Q. What floor do you call that?—A. That is the main floor, sir.

Q. That is below the mezzanine?—A. Below the mezzanine, yes.

Q. That is where you come in, or on the level at which you come in?—A. Yes, sir.

By Mr. MERRITT:

Q. Does this Defendants' Exhibit A correctly represent the layout of the ground floor and mezzanine of this building, except for a slight change in the location of the toilets?—A. That is right.

By the COURT:

Q. What does "Stores" mean, written on that down there? What do you mean by "stores"?—A. It is just space rented out on the main floor, the ground floor.

Q. By "Stores" do you mean the ordinary American use of the word "Stores" in place of shops, or do you mean something where you can keep your spare equipment, elevator cables, and so forth?—A. No, sir; the "Stores" in the main floor means a different section of the main floor rented to tenants.

Q. It is rented to tenants?—A. Yes, sir.

By Mr. MERRITT:

Q. For merchandising?—A. For merchandising.

Q. Will you tell the Court how many building service employees are now employed in that building?—A. 25 and myself. 26 altogether.

Q. This includes one starter for the freight elevators and one starter for the passenger elevators?—A. Yes, sir.

Q. It includes one assistant starter for the passenger elevators?—A. Yes.

Mr. MERRITT. I am leading. If there is any objection say so.

Mr. REYMAN. No objection.

Q. It includes five freight operators?—A. Yes, sir.

Q. And six passenger operators?—A. Yes, sir.

Q. It includes one handyman or mechanic?—A. Mechanic.

Q. It includes five day porters?—A. Yes, sir.

Q. And one night porter?—A. Yes, sir.

Q. It includes two watchmen?—A. Yes, sir.

Q. It includes two firemen who relieve each other?—A. Yes, sir.

Q. Have you any assistant superintendent?—A. No, sir.

The COURT. I thought that the witness who was on the stand yesterday was the assistant superintendent.

Mr. MERRITT. He so called himself.

The COURT. Yes. But you do not call him assistant superintendent?

The WITNESS. He is a mechanic, sir.

The COURT. He was a handyman?

The WITNESS. Yes.

Mr. REYMAN. That is right; he is the one your Honor called the handyman. He is variously described.

The COURT. That was the witness George Washington Silvera.

Mr. REYMAN. That is the one; yes.

The COURT. He is not assistant superintendent, then.

The WITNESS. No, sir.

Q. On pages 102 and 107 of the record, Harry Simon testified that he worked 47 hours a week. Is that or is that not so?—A. That is not correct.

Q. How many hours does he work?—A. 46.

Q. Is that the number of hours which all of the full-time men work at the present time except where they are paid overtime?—A. With the exception of the watchmen.

The COURT. Do they work as much as that or less?

The WITNESS. More than that, sir.

The COURT. How much do they work?

The WITNESS. 58 hours.

The COURT. I am sorry to interrupt you, Mr. Merritt, but there is one thing I meant to ask about yesterday and I don't think I did. What is this electric eye they told us about?

Mr. MERRITT. May I finish with these employees first so I may have it all in one place in the record?

The COURT. Yes, certainly; go ahead.

Q. What are the wages of the elevator operators?—A. $29.33 per week. That is before the Security is deducted.

The COURT. Is that some other tax, Security?

Mr. MERRITT. It is before the deduction of the Social Security tax.

The WITNESS. Yes.

The COURT. He means the New York or Federal tax?

Mr. MERRITT. Federal.

Q. What are the wages of the porters? You may refer to any memoranda you wish.

Mr. REYMAN. I remind the Court that the pay-roll records kept and signed by Mr. Ferdinand are in the record.

The COURT. Oh, yes; but this is a much more convenient way for me than to look through all of that.

A. The porters are $28.33 a week.

Q. Handyman?—A. The handyman is $38.51.

Q. The starters?—A. The passenger starter gets $35.45.

Q. Freight starter?—A. The freight starter, $33.41.

Q. Assistant passenger starter?—A. $32.39.

Q. Watchmen?—A. Watchmen, $30.35.

Q. Fireman?—A. Fireman, $31.37.

Mr. MERRITT. Now, if your Honor please, you wanted to ask about the electric eye.

By the COURT:

Q. I wanted to ask you about the electric eye that they said was some sort of guardian of the staircase. They said there were two electric eyes.—A. It is an electric apparatus that anyone who crosses that line——

Q. I know how they act, but what is it for in your building?—A. Well, it is for anyone coming down the stairs after hours would signal the watchman that someone was getting out and away.

Q. Where is the watchman stationed?—A. In the passenger hall.

Q. In the passenger hall?—A. Yes, sir. This alarm rings in the passenger hall—these two alarms.

Q. How about going up? The same thing, I suppose?—A. The same thing; yes, sir.

Q. How many of them are there? Two?—A. Two; yes, sir.

Q. One for each staircase?—A. Yes, sir; but one staircase comes to the main hall and anyone coming out or up the watchman could see them. It is not necessary to have an electric eye on that staircase.

Q. Do you call that the main staircase?—A. Yes, sir.

Q. Do the watchmen go around at all? At least, are they instructed to go around?—A. Yes, sir.

Q. And go up the stairs and down the stairs, and so forth?—A. To every floor; yes, sir.

Q. How many watchmen are there?—A. Two.

Q. Have they any instructions about alternation, so that when one is in main downstairs hall—I suppose one should always be in the main downstairs hall?—A. Yes, sir; there is always a man in the main hall.

Q. I suppose they alternate in the making of the rounds?—A. Yes, sir.

Q. Are there those clocks, or whatever they call them—I don't know the proper name of them—that they put a key in to show they have called at these different halls?—A. Yes, sir; we have a clock system, sir.

Q. Is the clock system all in the public part of the building?—A. Yes, sir; the public halls.

Q. When you have a case like this Mr. Wiesen we have been talking about, where he has four or five floors, does anybody go up and look into his place?—A. You cannot get in there, sir.

Q. You cannot get in there?—A. No, sir.

The COURT. All right; thank you very much.

By Mr. MERRITT:

Q. Is it a part of the duties of the watchmen to enter any of the leased premises?—A. No, sir.

Mr. MERRITT. Does your Honor understand that one of these electric eyes is in the fire tower which really empties into the street?

The COURT. The what?

Mr. MERRITT. The fire tower. I suppose it is a fire escape arrangement.

The COURT. I know they would have to have at least two, and I suppose three staircases under the fire regulations, fireproof staircases, in a building like this. I do not know just where they come but he said the one in the main hall did not need the electric eye but that they had the electric eyes on both of the others.

The WITNESS. That is right, sir.

Q. On page 75 of the record Mr. Lipsman testified as to removing desks and safes for the tenants from their premises to some other part of the building. Will you explain the extent to which that is done, if at all?—A. I don't remember instructing him to move any desks or safes of any kind.

Q. Do you remember that on one occasion where a tenant was moving from one floor to another floor that the desks were moved by the employees working under you?—A. I do not know. I do not remember it. I do not remember instructing my men to move those desks.

Q. Do you remember that it was done?—A. It was done; yes, sir.

The COURT. Was it done by your men?

The WITNESS. I do not know, sir.

Q. Don't you know it was done by employees working under you and didn't you so understand?

Mr. REYMAN. I object to that.

The COURT. I do not know how he could so understand. There is a man here who nods his head very wisely and perhaps he knows. I don't know who he is.

Q. Is it a part of the regular duties of your employees to move the tenants' property from the tenants' premises to another floor or outside of the building, or when they come into the building?—A. No, sir.

Q. Have you ever known of such being done by your employees?—A. No, sir.

Q. Mr. Lipsman also testified at pages 81 to 82 about moving certain records of tenants where the tenants wanted them destroyed and did not want them to fall into the hands of the contractor who ordinarily removed the rubbish. What have you to say about that?—A. I did not instruct him to burn any such rubbish or remove any such rubbish.

Q. Have you ever known of such being done by your employees?—A. No.

Q. Is it part of their duties to do such work?—A. No, sir.

Q. Mr. Heeder at pages 112 to 113, and I think some of the other witnesses, testified as to removing or handling rubbish that had been taken from the premises of the tenants. What have you to say about that?—A. May I explain just how the rubbish has been removed?

Q. Please do.—A. There is an outside rubbish concern paid by each tenant to remove their rubbish after hours. This truckman at three or four o'clock in the afternoon distributes bags throughout to all the tenants. These bags are put in the hallway after hours and are removed by this rubbish concern after hours.

Q. Who puts them in the hallway?—A. The tenants themselves. Now, in taking those bags and sometimes bundles of paper or rubbish, the rubbish man spills considerable lot of that stuff in the hallways. My men in the morning in cleaning the hallway, throw that into the incinerator and burn it up.

The COURT. What is the name of this concern that takes away the rubbish?

The WITNESS. The Wilson Paper Stock Company, sir.

The COURT. That is engaged by the tenants?

The WITNESS. Yes, sir.

Q. Is it a part of the duties of the employees working under you to do anything else in connection with this rubbish of the tenants other than that which you have just testified to?—A. No, sir; just the cleaning of the halls.

Q. And have you known of any of your employees doing any work in connection with the removal of rubbish for the tenants other than that to which you have just testified?—A. No, sir; only in cases where they make alterations, and so forth, for new tenants.

Q. That is, it might be in cases of new tenants or alterations for an existing tenant?—A. Alterations; yes, sir; and renewal of leases.

By the COURT:

Q. Where did this Wilson Stock Company leave the bags for rubbish, in the public halls?—A. No; right in the tenant's premises.

Q. In the tenant's premises?—A. Yes, sir.

Q. Then your men go into the tenant's premises to clean up the floor of the tenant's premises?—A. No, sir.

Q. You only clean up the public halls?—A. The public halls, that is all; yes, sir.

By Mr. MERRITT:

Q. On page 117 of the record Mr. Heeder testified that he had been called upon to remove oilcloth, cleaning floors, painting floors, and knocking down walls for tenants. Taking those items up one at a time, what, if anything, have your employees done as to removing oilcloth?—A. That is also for new tenants coming in; getting the space ready for new tenants.

The COURT. You do not remove oilcloth for tenants coming in?

The WITNESS. No.

Mr. MERRITT. The old oilcloth.

The COURT. The old oilcloth you mean?

The WITNESS. Take the old oilcloth off the floor; yes.

Q. So far as you know have your employees ever assisted tenants in laying down and removing oilcloth for their premises during the term of the lease?—A. A case here only a few weeks ago, where I instructed my men to go on the third floor. The name is Kaplan & Elias. I was called onto that floor and they had some linoleum company there remov-

ing the old linoleum from the floor and removing the cement and paste from the floor. They had the floor flooded at the time. It was a case of emergency, and to prevent the water seeping to the floor below I instructed my men to do that job, clean the floor up. It was an emergency—or the water would seep to the floor below.

Q. Have you ever done anything in connection with laying or removing linoleum for a tenant during the term of his lease, other than in this particular instance and for this reason?—A. No, sir.

The COURT. Who are those people, Kaplan & Elias?

The WITNESS. Kaplan & Elias; yes.

Q. The next item referred to by Mr. Heeder is cleaning floors. To what extent do your employees clean floors for tenants?—A. Only in renewal of leases, where we make alterations.

Q. Or in the case of new leases?—A. New leases; yes, sir.

Q. The next item is painting floors. To what extent, if any, have your employees painted floors for tenants?—A. Quite often on renewal of leases the house decides to paint these floors for new tenants, and sometimes in renewal of leases——

By the COURT:

Q. When is the time that you did any painting of floors in between leases?—A. And on renewal of leases.

Q. And renewals?—A. Yes, sir.

By Mr. MERRITT:

Q. Is it a part of the duties of your employees to paint floors for tenants during the term of a lease?—A. No, sir.

Q. Have they ever done so to your knowledge?—A. No, sir.

The COURT. I am rather astonished that you paint these cement floors. Do they paint the cement floors?

The WITNESS. Yes, sir.

The COURT. That would mean painting instead of putting oilcloth on them?

The WITNESS. Yes, sir. Well, in certain parts they use oilcloth, like the office and showrooms.

The COURT. Yes; I suppose so.

Q. The next item referred to was knocking down walls. Is it a part of the duties of your employees to change partitions or walls for tenants during the term of the lease?—A. Only in renewal of leases and new tenants.

Q. Mr. Heeder testified at pages 115 and 119 and 120 of the record relative to some work he did in connection with showcases. Can you tell us what, if anything, your employees do

in connection with showcases for tenants?—A. Yes, sir. That was on the 12th floor.

Q. Who was the tenant?—A. Max Schneck.

Q. And what was the type of work that was done and the occasion for it?—A. Schneck had two floors, complete floors; he gave up one-half of the 12th floor and we were forced to remove his show cases from the hall and make it into a public hall.

Q. Have your employees, to your knowledge, done any other work in connection with showcases of tenants under any other circumstances or for any other reason?—A. No, sir.

By the COURT:

Q. As I understand, it is like the concern that gave up one-half of one floor and you had to move his showcases which he had on that half that he relinquished?—A. That is right; yes, sir.

Q. And that was converted into a public hall?—A. That is right; yes, sir.

Q. In whole or in part? In part you mean, I suppose.—A. You see, part of this hall was formerly a showcase, and we had to remove the glass from the showcase and substitute a solid wall instead.

By Mr. MERRITT:

Q. What became of the showcases, if you know?—A. Well, the showcase consisted only of a plate of glass between the walls. Back of it was kind of a fixture that displays goods, back of that.

Q. Did you deliver them to a tenant's premises for further use, or what did you do with them?—A. The glass we put in the storeroom.

Q. The storeroom of the building?—A. Yes, sir. That is all there was to the showcase, just the glass.

The COURT. And you put it in in the first place, when he went in originally?

The WITNESS. That I do not know, sir; but we kept the glass for safekeeping in my storeroom, in case anyone should ask for it.

Q. What do you do in case of leaks in a tenant's premises?—A. That depends just what the leak is.

Q. If it is a leak threatening the general condition of the building or other tenants' premises, do you take any action?—A. In emergency. For instance, if it is pertaining to the leak of a water cooler, it is up to the tenants to take care of those

leaks. Though we would go up and shut the water off temporarily for him to avoid a flood.

Q. Would it be a part of the duties of your employees to otherwise take care of that leak or make the necessary repairs?—A. No, sir; we don't do any repairs on any such lines.

By the COURT:

Q. This so-called showcase that you mentioned, was it a raised affair at about the level of your waist, we will say, so you could look in and see something that was on exhibition?—A. That is right.

Q. It is just like a shop window?—A. Just like a shop window.

Q. It is just like a shop window, only it happened to be an interior shop window?—A. That is right; yes, sir.

By Mr. MERRITT:

Q. There has been some reference here to what is called public toilets, meaning toilets in a public hall, to be used by more than one tenant, and private toilets where the leased premises have extended to include the space where the toilets are located. What duties, if any, do your employees perform in connection with those toilets which are known as private toilets?—A. We make repairs of leaks, and so forth.

Q. You clean them up and care for them?—A. No, sir. We don't do any cleaning there.

Q. You do handle repairs where leaks are involved?—A. That is right; yes, sir.

Q. Do you do any work of repair under any other circumstances?—A. No, sir; not in the toilets.

Q. Will you state to the Court why you regard it as part of the duties of your employees to make repairs when leaks occur?—A. Well, because the tenants as a rule neglect such things and it would cause a flood below if we did not take action to repair the damage.

The COURT. That is even in the tenant's own private toilets?

Mr. MERRITT. Yes.

The WITNESS. Yes, sir.

Q. In the course of the conduct of this building where did you treat your responsibility as ending relative to water pipes?—A. I don't quite understand that.

Q. You have water pipes running to the tenants' premises, sometimes to a cooler, do you not?—A. Yes, sir.

Q. And water pipes run to places where steam is created, do they not?—A. Yes, sir.

Q. To what extent is it part of the duties of your employees to look after those water pipes?—A. We don't look after them

at all. They are installed by the tenants and maintained by the tenants.

Q. There was some testimony here by somebody relative to the installation of electrical feed wires, in the case I believe of a tenant by the name of Schneck where they wanted A. C. as well as D. C. current. Do you remember that circumstance?—A. Yes, sir.

Q. Tell us just what was done?—A. I was instructed by my office to install the A. C. line for Max Schneck on the 11th floor. It was the case of the renewal of leases, and he had no A. C. current on that floor and the agreement was we should give him A. C. current for a few machines.

Q. Just from what point to what point did those feed wires run which your men installed?—A. Well, we tapped the main lines in the freight hall, and ran to the other end of his loft and stopped there in a box or switch. That is all we did there.

Q. It is part of the duties of your men to look after the maintenance of electrical wires up to the point that they reach the main switchbox of the tenant in the tenant's premises?—A. No, just to the switchbox only.

Q. And that switchbox may sometimes be in the tenant's premises and sometimes in the public hall?—A. That is right, sir.

Q. Are these feed wires to which you refer regarded as the property of the Arsenal Building Corporation?—A. Well, we installed it.

The COURT. After the switchbox the rest was all for the tenant to attend to?

The WITNESS. Yes, sir.

Q. Testimony has been given on several occasions to the effect that your employees installed lights in the sockets, the electric fixtures.

The COURT. Bulbs in the electric fixtures.

Mr. MERRITT. Bulbs; yes.

Q. Will you tell us what the practice is in that regard?—A. Well, I don't know of any case where my men would install bulbs, unless it happens to be in a hall or something like that.

Q. Well, suppose the bulb had been broken and the socket of the bulb had been bound or difficult to remove?—A. Well, we have had several cases of that kind where the bulb in breaking in that socket to the extent that it caused a line shortage and it fused up and he would then go in and remove the piece of the bulb from the socket so that they would be able to hold the bulb firmly in place again.

The COURT. In other words, your men would install bulbs only in that case. Would you install the bulbs at all after he arranged it or would he just test it and see if it would be all right?

The WITNESS. Just remove he pieces of bulb from the socket.

The COURT. And the tenant would have to pay for the bulbs?

The WITNESS. Yes, sir.

Q. The tenant furnished the bulbs?—A. Furnished their own bulbs.

Q. And usually put them in themselves?—A. Put them in themselves.

By the COURT:

Q. If you had this phenomenon of short circuiting your electrician might remove the bulb that had been broken so that the fuse could be put in and held?—A. That is right; yes, sir.

Q. And then the tenant would put in the bulb?—A. That is right, sir.

Q. At least the tenant would pay for the bulb?—A. Yes, sir.

Q. And who put it in——

The COURT. I don't suppose it makes any difference?

Mr. MERRITT. I don't want the impression given to the Court that the tenant pays the landlord for the bulb because that is not the fact. He buys the bulb himself and furnishes his own bulb.

The COURT. But the tenant buys the bulb.

Mr. MERRITT. But not from the landlord.

The COURT. What difference does that make?

Mr. MERRITT. I don't suppose it does make any difference, but I just wanted it understood.

The COURT. All right.

By Mr. MERRITT:

Q. Does the Arsenal Building Company or its employees have anything to do with supplying locks or keys, or maintaining locks for the outer doors of the leased premises?—A. No, sir.

Q. As I do understand it, your employees look after the radiators, the condition of the windows, not including the cleaning, but their ability to open and close, and the condition of the entrance doors?—A. Yes, sir.

Q. Is that correct?—A. That is right, sir.

The COURT. The condition of what entrance doors?

Mr. MERRITT. The entrance doors to the leased premises. The door sticks where they are not in some way hung properly.

Q. Is it a part of the duties of your employees to keep the windows of the leased premises clean?—A. No, sir.

Q. Have you anything to add relative to work performed by your employees in the leased premises during the term of the lease?—A. No. There is nothing in there outside of what you have already mentioned.

Mr. MERRITT. That is all.

Redirect examination by Mr. REYMAN:

Q. You have been here since the building was opened, is that true, Mr. Ferdinand?—A. Yes, sir.

Q. Have you been superintendent during all the time you have been there?—A. Yes, sir.

Q. Where is your office in the building? Where are you located?—A. It is now on the 14th floor.

Q. How long has it been there?—A. About two or three months.

Q. Where was it prior to that time?—A. The 2nd floor.

Q. Are you in your office a good part of the day or are you out and around through the building?—A. Through the building most of the day.

Q. Is there a telephone in your office?—A. Yes, sir.

Q. And is there anyone in your office to answer the telephone should it ring?—A. No, sir.

Q. How do you transmit your messages to your employees with respect to work to be done? How do you give them your orders?—A. Sometimes by note, or see them myself.

Q. As you go through the building?—A. Yes, sir.

The COURT. Now, let me ask a few questions.

By the COURT:

Q. On board steamships with which I am much more familiar than I am with loft buildings, they have what they call standing orders which define what people are going to do daily and which is generally understood. Have you anything like that, any standing orders to your men, or to your employees?—A. Yes, sir.

Q. Are they printed or do you just give them orally or what do you do?—A. Well, I give them printed sheets sometimes, telling just what they are supposed to do.

Q. Have you any of those printed sheets here?—A. No, sir; I have not.

By Mr. REYMAN:

Q. You write quite a few notes to some of your employees, don't you?—A. Yes.

Q. And isn't it customary for you to write notes to George Silvera with respect to things for him to do?—A. Unless I happen to see him.

Q. Do you ever write notes to him, telling him to give instructions to other of the employees in the building?—A. Well, I do that not only to him but to anyone else.

Q. But you write notes to him, telling him to tell someone else to do something?—A. I do; yes.

Q. Is that rather frequent?—A. Quite often; yes.

Q. Is it daily that you do that?—A. I would not say daily, no; but quite often.

Q. George Silvera, according to your testimony and according to the exhibit, receives $38.51 per week?—A. That is right.

Q. And you call him a mechanic?—A. That is right.

Q. He is the highest paid one of all the maintenance employees, isn't he?—A. Oh, yes. Well, I do not know about other buildings.

Q. No; I am talking about the employees in this building.—A. He is the only one in the building. He is the only man there. He is the only mechanic, I mean.

Q. And isn't it true you depend on him more than any of the others to convey messages and see that work is done?—A. Well, I do.

Q. And isn't it true that he is generally regarded by the other employees as your assistant?—A. Well, no, he is known as a mechanic.

Q. Isn't it true the other employees call him your assistant, or assistant to the chief, or assistant superintendent?—A. No, I never heard him called by that name; no.

Q. You are out and around in the building quite a lot during the day, is that true?—A. That is right.

Q. And you say you have never seen any desks being moved?—A. Yes, many desks have been moved; yes.

Q. How about the showcases? You directed them to be moved?—A. Well, the showcases consist only of glass.

The COURT. We had that all out before. It is like a show shop window.

Mr. REYMAN. That is true. I am talking about what the employees do, if your Honor please.

The COURT. He told us what they do already.

Mr. REYMAN. May I inquire into it a little further?

The COURT. Yes; you may. Go on.

Q. These showcases are on a good many floors other than that one particular floor, aren't they?—A. No, that is the only floor.

Q. Is that the only floor that has tenant showcases?—A. That is, facing the hall.

Q. And whose floor was that?—A. Schneck's.

The COURT. Only one facing the hall he said.

Q. Coming back to the watchmen for a moment. The night watchmen do not have keys, I take it, to any of the tenants' premises?—A. No, sir.

Q. And where are the keys to the tenants' premises kept?—A. They keep the keys themselves. I have not got keys myself to their premises.

Q. So far as you know then the tenants have their own keys?—A. Yes, sir.

Q. Assuming that a watchman would find a door ajar at night in the course of his rounds, would he be authorized to enter onto the tenant's premises?—A. No, sir. He is authorized to push it shut in case it is open.

Q. And not go inside?—A. Not to go inside at all.

Q. Does he make any report under instructions immediately?—A. He does.

Q. To whom does he report?—A. He leaves a note for me.

Q. Leaves a note?—A. Yes.

Q. For you to get next morning?—A. That is right.

Q. That the door was open?—A. That is right.

Q. Assuming further he would hear a noise inside or someone in there or see someone, is he authorized to enter the tenant's premises?—A. He should use his own judgment in those cases and get a cop.

Q. So as a practical matter with the watchman, he would do what his judgment dictated at the time?—A. That is right.

Q. That is, he has that much discretion?—A. That is right.

Q. And if he saw a leak or saw a fire, he is authorized to enter in?—A. Excuse me. They have my home telephone and in any case of that kind they call me at home.

Q. Now, coming back to the rubbish that is removed by the contractor or the company employed by the tenants, your porters I think you said cleaned the halls in the morning after rubbish has been removed by the contractor, is that correct?—A. That is correct.

Q. And the rubbish that is removed by them is gathered up. I assume, and put on the elevators and taken down to the incinerator, is that correct?—A. Just the rubbish that was spilled over the halls.

Q. Your porters do clean the halls regularly and daily, do they not?—A. Yes, sir.

Q. They are the public halls?—A. Public halls.

Q. And they also clean the staircases that go from floor to floor?—A. Yes, sir.

Q. Does that hold true with respect to the staircases that run between floors, we will say between the floors of Wiesen?—A. Yes; that is right.

Q. They clean those?—A. Yes.

The COURT. Inside his quarters?

The WITNESS. No, sir; the stairs all run outside of the premises.

Q. Correct me if I am wrong, Mr. Ferdinand, Max Wiesen has five floors or five and one-half floors, is that correct?—A. That is right.

Q. And he has stairways running from floor to floor in the building?—A. No, sir. The stairways are on the outside of his premises entirely.

Q. And your porters clean those stairways?—A. Those stairs; yes, they do.

Q. He does use those stairways, that is, his employees do, do they not?—A. Well, they use them the same as any other tenant. They are there for everybody. It is not a special stairway just for those floors. Those stairways run from the roof to the street.

The COURT. I know they could not be interrupted, those particular stairs, under the fire laws. You would have to have them there.

The WITNESS. Yes; they go from the roof to the street.

Q. They run from the street through the building.

The COURT. You could not interrupt them. You could not stop them. They have to be free.

Q. They are open between the top floor that Max Wiesen has and above him?—A. In other words, if they close the doors to the stairs from their premises, the stairs still remain free for everybody to use.

Q. And my question is, isn't it true his employees use them from day to day?—A. Yes; they go from floor to floor.

Q. And there is continual passage of employees of Max Wiesen's from floor to floor?—A. That is right.

Q. But there are quite a few of his employees that use those stairways customarily and daily?—A. They do.

Q. In addition to the stairways there, Max Wiesen has a private elevator running between certain floors just within his leasehold, isn't that true?—A. Yes, sir.

Q. And do you have any instructions with respect to maintaining that elevator?—A. No, sir.

Q. Does he himself maintain it?—A. He does.

Q. Do you know whether or not any of your employees enter there from time to time for the purpose of adjusting it?—A. No; just for fusing up only.

Q. Who operates that elevator of Max Wiesen's?—A. Wiesen's themselves; their own employees.

Q. It is automatic, too, but it can be operated?—A. Yes; it is automatic, but they mostly have a man on it, too.

Q. Getting back again to the rubbish, there is a sizable accumulation of rubbish carried out by your porters each morning, is there not?—A. Well, there is a considerable lot spilled throughout the halls; yes.

Q. If you left it there through the day it would be inconvenient and unsightly, would it not?—A. Really we could not leave it in the hall. We dispose of it.

Q. No; I mean the part of the rubbish that drops on the floor, you almost have to take it up each day, don't you?—A. Naturally; yes. Halls will have to be cleaned every day.

Q. Because if they were not the tenants would complain and they would be handicapped?—A. That is right.

Q. So that it is the daily duty of your porters to clean the public halls?—A. That is right.

Q. Outside of the tenants' premises?—A. That is right.

Q. The floors that are mentioned in the building are concrete all the way through, are they?—A. Yes, sir; concrete floors.

Q. And they are rather thick, are they not?—A. They are.

Q. A heavy floor?—A. They are about eight or ten inches, I suppose.

Q. Would danger of flood be very severe if there is a common ordinary leak?—A. Oh, yes; it goes through.

Q. Goes through the cement?—A. Goes right through the cement.

Q. So that, as in the case of Kaplan & Elias, you do stand by to rescue the tenants from any damage, and the building?

The COURT. That is not right. He was called in by Kaplan & Elias.

Mr. MERRITT. He stands by to rescue his own building.

Mr. REYMAN. Let me put it the other way. I accept the criticism.

Q. Do you have to be called in by the tenant before you will give attention to any flooded condition on any floor?—A. Not unless it was reported to me by the tenant below that water was coming through his floor.

Q. Until that time, however, you would know nothing?—A. I would not know anything about it.

The COURT. He would not know anything about it.

Q. Assuming that the tenant himself did not give you notice but you got notice from someone else of a flooded condition, what would you do?—A. I would investigate to see where the water was coming from.

By the COURT:

Q. I suppose one of the reasons these floors flood from floor to floor, quite apart from the thickness of the concrete is not merely the seepage through the concrete itself, but it is also due to the fact that there are no raised coamings of any kind that would keep the flood from running down the stairs or running down the radiator holes or anything of that kind?—A. No, sir; there is no way of the water getting out.

Q. No way for the water to get out?—A. Unless say it is an inch or inch and a half deep.

Q. Then it could get out?—A. Then it could get out some place down the stairways or something.

By Mr. REYMAN:

Q. Max Schneck & Company also have more than one floor?—A. They now have a floor and a half. They had two floors until recently.

Q. Can you state just when they did give up the whole two floors? Do you know approximately?—A. Well, I do not know just exactly

Q. A month or two months or three months ago?—A. They were working there about a month and a half or two months ago. I am not quite sure.

Q. That is the eleventh and twelfth floors?—A. The 11th and 12th floors; yes, sir.

Q. What is Max Schneck's business?—A. Manufacturer of dresses.

Q. Do you know how many employees he has approximately?—A. Well, sir, I do not know.

Q. There is no elevator between his floors other than the public elevators?—A. That is all.

Q. Do you know whether or not his employees are accustomed to use the public hallway in the transaction of their business and running errands between floors?—A. No; they have a private stairway themselves from one floor to another.

Q. Who takes care of that stairway?—A. They do themselves.

Q. Their own porter?—A. Yes.

Q. You do not do anything at all, I think you said, on water pipes that run into the coolers and that run into the tenants' premises, carrying water for steam and other purposes?—A. No, sir; we do not do anything to them at all.

Q. If you are requested by the tenant to do it, would you see that it was done?—A. No, sir.

The COURT. You say if the tenant asked you to do something about it you would not do it?

The WITNESS. No, sir. I would suggest him getting a plumber from the outside.

Q. Do you know whether or not, Mr. Ferdinand, all of the maintenance employees in this building are organized into the building maintenance and employees union?

Mr. MERRITT. That is objected to as incompetent, irrelevant, and immaterial.

The COURT. I will let him ask that.—A. They are.

The COURT. That includes yourself?

The WITNESS. Well, I do not belong to the same union.

The COURT. You do not belong to any union?

The WITNESS. Yes.

The COURT. What is that?

The WITNESS. 164.

The COURT. What is that union?

The WITNESS. The Superintendents' Union.

Q. You would not be eligible for membership in this union, would you?

Mr. MERRITT. I object to that, your Honor.

Mr. REYMAN. Let us clear it up. We are going into it.

Mr. MERRITT. But I am going to continue to put in my objection.

The COURT. What difference does it make?

Mr. MERRITT. I don't think it makes any, but I don't want to get too far afield.

The COURT. He wanted to find out if he was in it. I agree that he is ineligible, but what difference does it make. That is not something for the United States Court to decide. It is something for them to decide.

Mr. MERRITT. That is why I make an objection to the question.

Mr. REYMAN. Does your Honor sustain it?

The COURT. I will sustain it. We are not going into it any further.

Q. Do you recall the strike that has been mentioned there in 1939?—A. Yes.

Q. And that strike, it has been said, was of about two days' duration, is that correct?—A. About two days; two or three days; I am not quite sure just how long.

Q. Were you on duty at the Arsenal Building on those days?—A. I was.

Q. Were all of your maintenance employees on strike?—A. They were all on strike.

Q. Were the passenger elevators running during the time of the strike?—A. No.

Q. Were the freight elevators running during the time of the strike?—A. No.

Q. And, of course, there would be no cleaning in the halls, I assume?—A. No cleaning up at all, sir.

The COURT. Not much necessity for it, I should assume.

Q. How about the heat?—There was something said yesterday that was not cleared up. Was there heat in the building at the time?—A. We had heat in the building at certain times.

Q. Was it the heat usually used; that is, was the source the usual source of the heat?—A. Well, the heat we generate ourselves. We had a man extra for that heat, an outside man. We had an extra man to fire those boilers.

Q. The tenants' business, I assume, was pretty well stopped during that time?

Mr. MERRITT. I object to that.

The COURT. I don't think that has anything to do with it. It is obvious. I went through that strike in the apartment house where I live, and I know what effect it had on us.

Mr. REYMAN. Of course your Honor is cognizant of the fact the only thing I am trying to do is put on the record that the businesses of the tenants could not function normally and in fact practically stopped during the time of the strike.

I think we all know it. I won't be long on it.

Mr. MERRITT. I do not concede it.

The COURT. I don't know anything about it, and I don't think he can know anything about it, himself.

Mr. MERRITT. After all, we are dealing with a situation of this kind which makes a lot of difference; that the tenants of the third floor or the tenants of the second floor would be different from a tenant on the 22nd floor.

The COURT. Yes, exactly.

Mr. MERRITT. The tenant on the 22nd floor naturally is going to be pretty badly crippled, but who is going to say that employees would not walk up one or two or three floors to earn a day's wages. Whatever argument there lies in this situation it seems to me is such a matter of common knowledge that the Court can almost take judicial notice of it.

The COURT. I think so, too. I don't think there is anything in it myself. I may be wrong. You know you don't have to take exceptions nowadays. You just propose your questions and I sustain the objections to them.

Mr. REYMAN. I ask your Honor's forbearance, and I will proceed very shortly and go to another subject.

By Mr. REYMAN:

Q. During that time, during those two days, Mr. Ferdinand did you have occasion to discuss with any of the tenants when the elevators would start running?

Mr. MERRITT. Objected to as incompetent, irrelevant, and immaterial.

The COURT. I do not think that has anything to do with this.

Q. Did any of the tenants complain to you about the stoppage of the elevators?

Mr. MERRITT. Same objection.

The COURT. Sustained. That has nothing to do with it.

Mr. REYMAN. This slip of paper I have in my hand, your Honor, I would like to have marked for identification.

(Marked "Plaintiff's Exhibit 6" for identification.)

Mr. MERRITT. May I see it before you show it to the witness?

Mr. REYMAN. Of course [handing to Mr. Merritt].

Q. I show you the exhibit marked Plaintiff's Exhibit 6 for identification [handing to witness], and ask you whether or not you can identify that as being written by you?—A. Yes, I wrote that.

Q. Will you tell me, please, who the George on this exhibit means?—A. George Silvera.

Q. And, shortly, will you say that this is in the nature of instructions written by you to George?—A. That is right.

Mr. REYMAN. I offer it in evidence. There is a typewritten copy attached which I think is accurate [handing to Court]. Have you any objection, Mr. Merritt?

Mr. MERRITT. No objection.

(Plaintiff's Exhibit 6 for identification received in evidence, being dated February 26, 1941.)

(Short recess.)

(Plaintiff's Exhibit 7 marked for identification.)

Q. I show you Plaintiff's Exhibit 7 marked for identification, Mr. Ferdinand.

Mr. MERRITT. Would you mind showing it to me?

Mr. REYMAN. I am sorry. Maybe you can look at all of them [handing to Mr. Merritt].

Mr. MERRITT. You can show me one, and go ahead, and I will hand them over to you.

Q. I ask you whether or not that exhibit is in your handwriting [handing to witness]?—A. That is right.

Q. I ask you further whether that is also an instruction issued in writing to Mr. Silvera?—A. Yes, that is right.

Mr. REYMAN. This is offered in evidence, your Honor.

The COURT. Any objection?

Mr. MERRITT. No.

The COURT. What is the date of it?

Mr. REYMAN. February 24, 1941.

(Plaintiff's Exhibit 7 for identification received in evidence.)

(Plaintiff's Exhibit 8 marked for identification.)

Q. I show you Plaintiff's Exhibit 8 for identification, Mr. Ferdinand, dated February 25, 1941.—A. Please, your Honor, I never put any dates on those slips. Those dates were not put on by me.

The COURT. I do not care who put them on.

Mr. REYMAN. They carry a date.

The COURT. They carry a date anyway.

Q. It is dated February 25, 1941, directed to Arthur and George. I ask you whether or not that slip is in your handwriting [handing to witness]?—A. That is right.

Q. And that also is an instruction to Mr. Silvera?—A. Yes; that is right.

Q. Who is the George referred to?—A. George is Silvera, and Arthur is Lipsman.

Mr. REYMAN. That is offered in evidence.

The COURT. Any objection?

Mr. MERRITT. No objection.

(Plaintiff's Exhibit 8 for identification received in evidence.)

(Plaintiff's Exhibit 9 marked for identification.)

Q. I show you Plaintiff's Exhibit 9 marked for identification, a slip of paper carrying the date February 28, 1941 [handing to witness], and ask you whether or not that writing is yours?—A. It is my writing to about here [indicating]; just the top part with my signature. The entire thing is not my handwriting.

Mr. REYMAN. He identifies it, your Honor, as being his handwriting down to a certain word? "Main" I think is the word.

The WITNESS. Yes, sir.

Mr. REYMAN. M-a-i-n.

The WITNESS. You notice there are two handwritings on here, your Honor?

The COURT. It is marked "By Mr. Ferdinand." That means you, doesn't it, up above here?

The WITNESS. Above; yes, sir.

The COURT. That [indicating] is not in your handwriting?

The WITNESS. The bottom part is not. Just the top part.

The COURT. And the word "Main" and the rest of it is not in your handwriting?

The WITNESS. That is right.

Q. Do you recognize the handwriting that appears on the lower part of the exhibit?—A. I do not; no.

Q. You do not know whose it is?—A. No, sir.

Mr. REYMAN. The slip is offered in evidence as Plaintiff's Exhibit 9.

The COURT. Any objection?

Mr. MERRITT. No, sir.

(Plaintiff's Exhibit 9 for identification received in evidence.)

The COURT. Do you recognize the handwriting that shows the dates that are written?

The WITNESS. No, sir; I don't.

(Plaintiff's Exhibit 10 marked for identification.)

Q. I show you Plaintiff's Exhibit 10 for identification, being a slip of paper carrying the date March 6, 1941—"3/6/41"—and the word George, and ask you, Mr. Ferdinand, whether or not that slip is in your handwriting? (Hands paper to witness.)—A. It is.

The COURT. All of it, part of it, or how much?

The WITNESS. All of it, sir.

Q. Is the George referred to there Mr. Silvera?—A. That is right; yes, sir.

Mr. REYMAN. I offer that in evidence as Plaintiff's Exhibit No. 10.

The COURT. Any objection?

Mr. MERRITT. No, sir.

(Plaintiff's Exhibit 10 for identification received in evidence.)

(Plaintiff's Exhibit 11 marked for identification.)

Q. I show you Plaintiff's Exhibit 11 for identification, being a slip of paper carrying the date 3/6/41, with the name George at the top. I ask you whether or not that is your handwriting [handing to witness]?—A. That is my handwriting; yes, sir.

Q. And George is Mr. Silvera?—A. That is right.

Mr. REYMAN. That is offered in evidence as Plaintiff's Exhibit No. 11.

The COURT. Any objection?

Mr. MERRITT. None.

(Plaintiff's Exhibit 11 for identification received in evidence.)

(Plaintiff's Exhibit 12 marked for identification.)

Q. I show you, Mr. Ferdinand, four sheets of paper tacked together, marked as Plaintiff's Exhibit No. 12 for identification, the top sheet carrying a date 3/10/41, the second sheet 3/10/41, the third sheet 3/10/41 Monday, and the fourth sheet 3/10/41, and ask you whether or not any or all of those sheets are in your handwriting (handing to witness)?—A. This is not [indicating]. The others are in my handwriting, yes.

Q. The first three sheets, then, are in your handwriting and have been written by you?—A. That is right.

Q. The fourth sheet is not in your handwriting?—A. No.

Q. Do you recognize the handwriting of the fourth sheet?—A. No, I don't.

Mr. REYMAN. The four sheets are offered in evidence as Plaintiff's Exhibit No. 12.

Mr. MERRITT. First I object to the fourth sheet which has not been identified, as to whose handwriting it is in.

Mr. REYMAN. I withdraw the offer of the fourth sheet, if the Court please.

The COURT. What is on the back of that, on the back of those sheets?

Mr. REYMAN. Do you mean the attachment? International Gummed Tape Mfg. Co. It is offered as Plaintiff's Exhibit No. 12.

Mr. MERRITT. I have no objection.

The COURT. Those exclude the fourth.

Mr. REYMAN. Excluding the fourth. The three sheets go in.

(Plaintiff's Exhibit No. 12 for identification received in evidence.)

(Plaintiff's Exhibit 13 marked for identification.)

Q. I show you, Mr. Ferdinand, a paper marked Plaintiff's Exhibit 13 for identification, carrying the date 3/11/41, and the names George and Arthur [handing to witness.].—A. That is right.

Q. Can you identify that as being in your handwriting?—A. Yes, that is right.

Q. The George and Arthur——A. Are the same two.

Q. Directed to George Silvera and Arthur Lipsman?—A. That is right.

Mr. REYMAN. That is offered in evidence as Plaintiff's Exhibit No. 13.

The COURT. Is there any objection?

Mr. MERRITT. No objection.

(Plaintiff's Exhibit 13 for identification received in evidence.)

(Paper marked "Plaintiff's Exhibit 14" for identification.)

Q. I show you Plaintiff's Exhibit 14 for identification, a slip of paper bearing date 3/25/41, directed to "George and Arthur," and ask you who wrote that slip?—A. I did.

Q. And it is your handwriting?—A. Yes.

Q. And George and Arthur, I assume, refer to George Silvera and Arthur Lipsman?—A. That is right.

Mr. REYMAN. It is offered in evidence.

Mr. MERRITT. I have no objection.

(Plaintiff's "Exhibit 14" for identification received in evidence.)

Q. Referring to the Plaintiff's Exhibits 6 through 14 inclusive offered in evidence, Mr. Ferdinand, will you explain, if you will, when each one of those sheets was prepared, that is, how you happened to write them and to whom you gave them, and the circumstances under which they were prepared?—A. Well, I could not say. Often I will give them to an operator to give to George and sometimes I give it to him myself.

The COURT. What do you mean by an operator?

The WITNESS. Either one of the freight operators.

The COURT. Elevator operators?

The WITNESS. Yes, sir.

Q. Those are instructions issued by you, are they not?—A. That is right.

Q. And pertain to work to be done on particular days at the Arsenal Building by the employees under your direction?—A. Yes, sir.

Q. And at the time you wrote them, Mr. Ferdinand, were you acting under instructions from any other person with respect to the work to be done?—A. Certain things there, yes.

Q. Can you explain briefly under what circumstances you would write instructions such as are contained in those exhibits? Is it a routine matter or is it something unusual, or just why do you write the instructions?—A. I write them so they will be carried out.

Q. And the instructions when written are handed, we will say, to Mr. Silvera?—A. Maybe, or an operator, to be given to him.

Q. To be handed to him?—A. That is right.

Q. And I assume it is customary to have the operators act as messengers for you throughout the building when you are busy doing something else?—A. Yes.

Q. And the elevator operator might see them before you would, is that correct?—A. That is right.

Q. What method do you use to check up to see whether or not your instructions are carried out?—A. In some cases I do not. The mechanic makes a note every day of just what he did.

By the COURT:

Q. That is what you call your log?—A. Yes; and most of the time I take it for granted it has been done.

Q. So it is the log that tells you what has been done through the day?—A. That is right.

Q. Does any employee other than Mr. Silvera keep a log?—A. Not that I know of; no, sir.

Q. Do you examine the log entries made by Mr. Silvera each day?—A. No; Silvera does not keep the log book. I do. He gives me a slip of paper every night stating just what he did for that day, or the next morning of what he did the day before and I enter it in the log book.

Q. So you are the one that keeps the log book and not Mr. Silvera?—A. Yes, sir.

The COURT. Have you a copy of your log book here now?

The WITNESS. Yes; I have it here now.

Mr. REYMAN. May we see it?

Mr. MERRITT. I think it is entirely proper that he should.

The COURT. I think so, too.

The WITNESS. I will get it.

Mr. MERRITT. Let it appear that we have produced this so-called log book for the period commencing July 31, 1939, to date [handing book to Mr. Reyman].

(Papers marked "Plaintiff's Exhibits 15, 16, and 17" for identification.)

Mr. REYMAN. And the log book as produced, if your Honor please, I should like to have marked for identification.

(Marked "Plaintiff's Exhibit 18" for identification.)

The COURT. It is almost lunch time and you will have plenty of time to look at it during the recess.

Under the ancient rule of Judge Lacombe, as long as you called for it and it has been produced during cross-examination, it is rendered competent for them to put it in if you do not, so it is in, practically speaking, in any event. That is what Judge Lacombe ruled in a case, and while I know there is some difference of opinion about it, that is what I understand we always do in this court.

Mr. REYMAN. I will put it in.
The COURT. I supposed that you would.
(Recess until 2:30 p. m.)

AFTERNOON SESSION

JOSEPH FERDINAND resumed the stand.

Redirect examination resumed by Mr. REYMAN:

Q. I show you, Mr. Ferdinand, a sheet of paper carrying the date 3/10/41, marked "Plaintiff's Exhibit 15" for identification, which appears to be a carbon copy of a sheet, and ask you whether or not you recognize the handwriting on that sheet [handing to witness]. Is it handwriting you have seen before?—A. I could not say.

Q. You do not know?—A. No.

The COURT. Is that the excluded fourth page?

Mr. REYMAN. Yes, sir. There were three admitted in evidence.

The COURT. There was only one was excluded or withdrawn.

Mr. REYMAN. Yes, sir; this is the particular one.

Q. I show you Plaintiff's Exhibit 16 for identification [handing to witness], a similar sheet of paper carrying the date 3/11/41, and ask you whether or not you can recognize the handwriting on that sheet?—A. No; I cannot.

Q. And the same question is directed to Plaintiff's Exhibit 17 for identification carrying the date 3/25/41?—A. No; I cannot say for sure yes or no.

Q. You did testify, did you not, Mr. Ferdinand, that Mr. Silvera gives you written reports of work done each day, or occasionally rather, routine, and from that entries are made into the log book which has been identified?—A. Yes, sir.

Q. Which is Plaintiff's Exhibit 18 for identification. Referring now to Plaintiff's Exhibits 6 through 14, inclusive, have any of the entries in the log book which I show you, too, which is marked "Plaintiff's Exhibit 18" for identification—have any of the entries in the log book been made from any of the other exhibits?—A. Well, that I don't know. I could not say for sure because it is not taken from this slip of paper to the log book; it is taken from the mechanic's report.

By the COURT:

Q. Which may be oral, you mean?—A. No, sir; it is a written report from the mechanic.

Q. A written report?—A. But this report is from me, your Honor.

Q. It is a written order from you?—A. Yes.

Q. And is reported back to you, as to what has been done?—A. Yes, sir.

By Mr. REYMAN:

Q. Did these Exhibits 6 to 14, or any of them, come back to you from the mechanic, or whoever had them, after the work was done or he said it was done?—A. Some of them did come back. I could not swear that they all came back.

Q. Do you preserve the sheets or reports that the mechanic brings back to you?—A. No, sir; I throw them out.

Q. And from which entries are made into the log book?—A. No, sir; I throw them out.

Q. Is this the full and complete log, referring to Plaintiff's Exhibit 18 for identification which I hand you [handing to witness]?—A. Yes, sir; that is it.

Q. For the period purported to be covered in there?—A. Yes.

Q. Which is from July 1, 1939, to March 29, 1941, I take that to be; is that right?—A. That is right; yes, sir.

Q. And have all of the entries in here been made by you?—A. Yes, sir.

Q. Have you had a vacation within the past several months—that is, when you have been away from the Arsenal Building, absent from your duties on vacation?—A. No. I was sick for a week. I was away one week.

Q. Who took your place at that time?—A. Silvera did.

Q. Mr. Silvera. And did he perform the duties during that time, so far as you know, generally performed by you when you are there?—A. As far as I know, yes.

Mr. REYMAN. I offer the log book in evidence as Plaintiff's Exhibit 18.

Mr. MERRITT. No objection.

(Plaintiff's Exhibit 18 for identification received in evidence.)

By the COURT:

Q. During that week while you were ill were there entries made?—A. No, sir; I made no entries that week.

Q. Did you fill it in afterwards?—A. I did not fill that week in at all, because I was not quite sure of what was done.

By Mr. REYMAN:

Q. I show you Plaintiff's Exhibit 1, which I take it is in evidence, although still marked for identification.

The COURT. What is it?

Mr. REYMAN. It is the brochure, your Honor.

The COURT. It was marked in evidence finally.

Q. I ask you if you know, Mr. Ferdinand, who issued that booklet, and when if you do know?—A. No, sir; I don't.

Q. Have you ever seen it before or one like it?—A. I don't believe I did.

Q. You have testified to the wages paid to men under your direction?—A. Yes.

Q. And you have stated that the amounts you have given are net; that is, Social Security tax deducted?—A. That is right.

The COURT. No. I thought it was just the other way around.

The WITNESS. It is before the Security.

Q. So that the amounts are not taken out?—A. Not taken out.

The COURT. Social Security has not been taken out.

Mr. REYMAN. Yes. I was not clear on it, your Honor.

Q. Was the Social Security tax deducted before the actual salary or wages was paid?—A. Yes, sir.

Q. Did you yourself make up the pay roll?—A. I did.

Q. There is no one under your direction—you yourself?—A. Make it out myself.

Q. And pay the men?—A. Pay the men myself, with the exception of the week I was off. I made the pay roll out but someone from the office brought the money over and paid the men themselves.

Q. What is your wage, Mr. Ferdinand?—A. $75 a week.

Q. And is your wage made up, or your pay roll made up separate? Is your name on the same pay roll as that of the other employees?—A. Yes; on the same pay roll.

Q. Where do you draw the funds used to make payment of the wages?—A. From Spear & Company.

Q. Are you entitled to a vacation?—A. I do.

The COURT. What is that? That is like a marriage service. "Are you entitled to a vacation? I do."

The WITNESS. Yes, sir; I am entitled to a vacation.

Q. But you have not taken it, is that it?—A. Well, I did. I took my vacation one day a week. I wanted it that way always, or for the past sixteen years.

Q. And on that one day every week—which day is it, by the way?—A. Wednesday, sir.

Q. On Wednesday when you are away who is regarded as being in your place and in charge of the men?—A. Silvera.

Q. You have said that you are in and around the building most of the day. Is that a comparatively busy building as buildings go in the Garment Center?—A. It is a busy building.

Q. And it is true, is it not, that it is one of the largest loft buildings in that section down there?—A. It is not the largest.

Q. One of the largest?—A. One of the largest.

Q. Will you state whether the passenger elevators are generally busy? That is, are they always carrying passengers up and down? There are five of them, I think, aren't there?—A. Five of them.

Q. Is the traffic heavy or is it light?—A. Heavy.

Q. With respect to the freight elevators, what would you say?—A. Also heavy—freight and passengers.

Q. And there near the freight elevators is the express runway. That is the place where the Railway Express trucks back in. Who maintains and keeps that areaway or runway clean?—A. The express company themselves.

Q. And do they pay rental for that space?—A. That I do not know.

Q. Are the tenants permitted to carry merchandise up through the stairways in the building from floor to floor in rather large packages or by racks?—A. No, they are not allowed to carry racks up the stairs.

The COURT. They could not carry racks. They roll.

The WITNESS. They might take bundles or packages or something like that.

Q. There is a building rule against carrying racks from floor to floor via stairway, is there not?—A. Well, I never had occasion to make those rules. I never saw them going through the stairs.

Q. Haven't you heard of a rule that racks and trucks cannot be transported by two or more people through the hallways?

Mr. MERRITT. What do you mean by rule? Rule of this building?

Mr. REYMAN. Yes. I will amend the question.

Q. A rule of the building, because it might chip the steps and otherwise disfigure the paint and so on?—A. No, we had no rules to that effect, but I certainly would not allow them to pull any racks through the stairs because of fire hazard only, if nothing else.

Q. Coming back to Max Wiesen & Company, do they occupy the most space in the building? Do they not?—A. They do.

Q. And only one other tenant, that is Max Schnecks, occupies more than one floor? That is correct?—A. Yes.

Q. Do you give any particular or special services to either one of those two tenants?—A. No, sir.

Q. Do you with respect to Wiesen, during the day—and when I say "you", I mean your elevator operators and others—transport trucks and merchandise between the floors occupied by that company?—A. We do while the car is on the way up or down. But we do not make a special trip.

Q. How about the employees? Are they permitted to use the passenger elevators?—A. Yes.

Q. They are?—A. Yes.

Q. Do they use the freight elevators at times?—A. They do, too.

Q. And I suppose during the rush hours or during the reporting hours, and when they are going off in the afternoon, they would use the freight elevators more than any other time during the day?—A. I guess it is about the same on both sides.

Q. I understood there used to be a rule against using passenger elevators but they do use them, is that correct?—A. That is so far back for the time they probably could do that. Now they cannot because there are too many people for the passenger cars.

The COURT? Were you ever in Seventh Avenue during the lunch hour?

Mr. REYMAN. Yes; I have been up there and to the Arsenal Building, too, your Honor.

The COURT. I was just wondering whether you had been there in that crowd.

Q. You are familiar with the tenants who occupy these various floors, I suppose?—A. Yes, sir.

Q. And is it true that some of the tenants have a sort of a reception room or reception area off the passenger elevator level as they go in?—A. I do not just understand what you mean?

Q. Let me describe what I mean: when the person steps off the passenger elevator onto a floor level for some particular tenant, where tenants may be, there is usually a lobby or lounge or entrance way into the place of business?—A. After leaving the hall; yes.

Q. Do the porters for the building, your men, keep that hallway clear just outside of the passenger elevators?—A. In the hall only.

Q. In the hall?—A. Yes.

Q. What I am trying to ask you is, isn't there usually a lobby or area there in the public hall before you go into the tenant's place of business?—A. You mean outside of the

doors? Beyond that is the lobby. It is considered a public lobby. The entrance doors are beyond that.

Mr. REYMAN. That is all I have.

Re-cross-examination by Mr. MERRITT:

Q. Look at Exhibit 12 [handing]. I note the first item on it is "Repair lock on 7th floor center." Was that a lock in a door of vacant space?—A. I do not know if the space was vacant at the time. That depends on when that was written. I just do not know.

Q. You do not know the dates when these various instructions were given?—A. No, sir.

Q. And none of those dates were put on by you?—A. No, sir.

The COURT. None of the dates on those exhibits?

Mr. MERRITT. On these exhibits, 6 to 14.

The COURT. Do you know the handwriting?

The WITNESS. No, sir; I do not know.

Q. You do not know how they were put on or why they were put on?—A. No, sir.

Q. If the date which is written on here, March 10, 1941, is correct, would it then be true that the first item, "Repair lock on 7th floor center" related to vacant space?—A. I would not know just offhand at the time that loft was taken.

Q. It might be and it might not be.—A. That is right.

Q. You testified to the question of caring for locks and keys on the entrances of premises of the tenants?—A. That is right.

Q. This is an item which says "Repair lock on 7th floor center."—A. There are occasions—those doors consist of three or four locks. The building equips those doors with one lock as a latch. That latch I feel that we should keep in condition. It might be one of those cases that the loft might be vacant.

Q. And all these doors entering the tenants' premises have another lock which is the tenant's lock?—A. Two or three additional locks, additional to the building lock.

Q. And these other locks are the tenant's locks?—A. That is right, yes, sir.

Q. Can you state whether or not some of these items on Exhibits 6 to 14 inclusive relate to vacant space?—A. Yes.

The COURT. Can you tell which ones, if it is important? I do not know.

Mr. MERRITT. It is not important enough from my point of view to go through each one.

The COURT. All right.

Q. Is it a fact that all leases expire on February 1st?—A. As far as I know; yes, sir.

The COURT. In that building, you mean.

The WITNESS. In that building; yes, sir.

Q. Is it true that when leases expire and renewals are made that the building sometimes agrees to make some special repairs in the occupied premises?—A. Yes, sir.

Q. Are those repairs always made on or about February 1st when the lease is renewed?—A. No, sir.

Q. Why not?—A. In some cases the painting of floors and different things of that kind, the tenant refuses to have us do the floor until they are in there for some time.

Q. Is that their busy season?—A. Busy season, yes, sir.

Q. What reasons do they give you for refusing to let you make the repairs you have agreed to make?—A. They are too busy and they cannot be disturbed.

Q. Can you state whether or not it is true that with your forces it is not always practicable to make all the repairs that you have agreed upon at a particular date when the renewal lease begins?—A. Most of the work is given out to outside contractors, such as building all offices, showrooms, and so forth, and making changes in circulating pipes.

Q. In some of these Exhibits 6 to 14 reference is made to angle-irons. If the other side does not object let me see if I can describe what the angle-iron is. It is an iron that fits over some corner like a pillar, clamping on both sides so as to prevent injury to the plaster, or something of that kind?—A. It is an iron on a column.

Q. It is an iron fitted onto the corner of the column?—A. Well, the column is originally plaster, and after awhile the plaster is knocked off, leaving the plaster off. I suggested to the office instead of replastering these columns, put angle-irons on and they will last longer.

Q. And they are part of the structure?—A. They are part of the structure, yes.

Q. How high up do they run from the floor?—A. Five foot.

The COURT. I never heard those things called angle-irons.

Mr. MERRITT. Neither did I.

The COURT. I have been used to the angle-irons on ships for years.

The WITNESS. Mostly called corner irons.

By the COURT:

Q. There are a great many columns, as you call them, in these loft spaces?—A. Yes, sir.

Q. As part of the structure of the building?—A. Yes, sir.

Q. You have a great many of them, haven't you?—A. Yes, sir.

Q. What are these angle-irons made of?—A. 14-gauge iron. That is a little less than an eighth of an inch thick. Four inches wide, both side, and five feet high. You see they are bolted to the column, to the plaster, and in case of anything hitting that angle-iron, it won't have to fall apart as much as the plaster would.

Mr. MERRITT. That is all.

Redirect examination by Mr. REYMAN:

Q. If I understood you correctly, Mr. Ferdinand, in looking at Plaintiff's Exhibits 6 to 14 inclusive, and referring to the dates which are written thereon, you said you did not know who wrote those dates.—A. I do not know, no.

Q. And you do not know how they got on there?—A. I do not know.

Q. You have seen Mr. Silvera's handwriting many times no doubt.—A. I did.

Q. Almost every day?—A. Yes.

Q. Would you recognize it if you saw it?—A. Well no. The handwriting shown to me there looks like his handwriting, but I could not swear to it, and that is why I said I did not know.

Q. Do you think that might be his handwriting?—A. It might be his handwriting, but I cannot say; I am not positive.

Q. Would you say the same thing as to Exhibits 15, 16, and 17 for identification [handing to witness]?—A. Part of this writing looks like my own.

Q. Which part? What are you referring to?—A. For instance, take this "Repair flush valve."

Q. This is on Exhibit 15 for identification.—A. This looks like my handwriting there [indicating].

Q. How about the rest of the handwriting on that sheet?—A. No; they are not all mine.

Q. The rest of the handwriting, is that similar to any you have seen before; does it look like Mr. Silvera's, Mr. Lipsman's, or any other of your men?—A. I could not be sure.

Q. Is it similar to Mr. Silvera's handwriting?

Mr. MERRITT. I object to pushing this any further. I have offered to counsel that if he will give me his statement as to who wrote these I would accept it and they can go in evidence if written by a proper person. He asks if it is similar, and "similar" is not a proper way to identify handwriting.

The COURT. I should say not. I was just waiting for someone to object to it. What difference does it make?

Mr. REYMAN. It seems to me, your Honor, that the witness is evasive. He can say whether or not it is like Mr. Silvera's handwriting.

The COURT. He has said already it is like his.

Mr. REYMAN. Then I stand corrected.

The COURT. That the handwriting, as to dates, looks like Silvera's. You have said that already, haven't you?

The WITNESS. Yes, sir.

Mr. REYMAN. I did not understand that he said it.

The COURT. I have written it down here in so many words, that it looks like Silvera's but I am not absolutely sure about it, that is the reason I didn't know.

Mr. REYMAN. I say I think it is Silvera's. I have been told it is Silvera's, and I am perfectly willing to say on the information I have it is Silvera's.

Mr. MERRITT. If you don't know, that is different.

The COURT. I do not think it makes the slightest difference. They happen to be some recently dated orders from this gentleman, Mr. Ferdinand, to Mr. Silvera and other people, that is all. If Mr. Silvera dated them, well and good.

Mr. REYMAN. But the three exhibits, if the Court please, Plaintiff's Exhibits 15, 16, and 17 for identification, are not the exhibits dated and referred to as having been written—that is, the body of the writing—in Mr. Ferdinand's handwriting.

The COURT. No, those are for identification still.

Mr. REYMAN. That is correct.

The COURT. I do not know anything about those. I have looked at them and I do not know.

Mr. REYMAN. One of them, dated March 10th, Plaintiff's Exhibit 15 for identification, Mr. Ferdinand told me he did not recognize at all, and it is my understanding of his testimony, and I think it is your Honor's, as you just stated, that it looks like Silvera's.

The COURT. See if that is what he said about those exhibits. Show them to him and ask him that. That is what I understood him to say, that the only reason he did not say it was Silvera's, was that he was not certain that he knew the handwriting but he thought it looked like it.

The WITNESS. That is just what I said, your Honor.

The COURT. Yes, that is what he said. I do not think he was evasive at all. I have noticed again and again when it comes down to handwriting that some people cannot identify their own. I cannot, I know. Let alone somebody else's which may be written in a hurried way. I do not consider

him evasive at all about that. But I have that down in so many words right here, and underlined with my pencil.

Mr. REYMAN. That is all.

Mr. REYMAN. I ask the other side about this. We have three employees here and their testimony will be very brief, but we also have representatives of two or three tenants. If it is a matter of inconvenience to have the employees out now we will call them first, otherwise we will try to accomodate one of the tenants.

Mr. MERRITT. Who are these employees?

Mr. REYMAN. A watchman and firemen.

Mr. MERRITT. I think we better get rid of the employees.

The COURT. Let us put the watchman on, then.

Mr. MERRITT. These will be all of the employees?

Mr. REYMAN. Yes.

MANUEL LONGUERIA, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. ROZEN:

Q. Where do you reside, Mr. Longueria?—A. 289 East 136th Street.

Q. Where are you employed?—A. 463 Seventh Avenue.

Q. In what capacity, sir? What do you do?—A. As a watchman.

Q. When do you go on duty?—A. 6 o'clock at night, 6 in the evening.

Q. How many hours a week do you work?—A. 58 now.

Q. At what time do you quit?—A. 3:40 in the morning.

Q. Will you tell the Court what your general duties are, please?—A. Well, in the beginning my duties is just come in and take a look, and find my watch and keys, and then——

The COURT. How many hours does the witness say he works?

Mr. ROZEN. 58, your Honor.

Q. Continue.—A. Then I proceed to look to see if it is necessary to work on the car, if I have to relieve an operator, or anything like that.

Q. You relieve an operator?—A. No; I have to take one extra car to help the operators working there.

Q. What cars are those?—A. Passenger cars.

Q. Do you ever relieve on the elevator cars?—A. I don't relieve now.

The COURT. On the freight cars, you mean?

Mr. ROZEN. Yes, sir.

The COURT. You said elevator cars.

Q. I meant freight elevator cars.—A. Not freight. Years before, yes.

Q. You had worked on freight cars?—A. Years before.

The COURT. How long have you been there?

The WITNESS. Eight years.

Q. What are your other duties?—A. Well, I have to do with the clock, every few hours, from 10 in the night on, and I have to clean cars.

Q. What kind of cars?—A. The passenger cars, the brasses, and clean the bodies. It has to be simonized.

Q. Is that the freight elevator cars you are talking about?—A. The passenger cars. Also take care and look at the boiler during the summertime, to keep the water hot. That is only a couple of times a night. And check on what is necessary in the whole building. When it needs cleaning on the floor I have to go there and do it. It is a question to see if a job is performed, and any trouble I refer to the superintendent next day.

Q. What kind of trouble?—A. If I find a leak or find any broken thing, find any door open on some of the premises, anything I find around the house, if I cannot help myself I report it to my superior.

The COURT. Does somebody succeed you at 3:40 a. m.?

The WITNESS. There are supposed to be two watchmen, and one watchman remains until 7 in the morning. He comes in later than me. He comes in 9:30 in the night, until 7 in the morning.

Q. Do you make regular rounds?—A. Every two hours. 10, 12, 2 and 3:30 now because I am quitting before 4 o'clock.

Q. How do you make your rounds?—A. On the elevator. I go from floor to floor on the elevator.

Q. You get off on the floor and look around on each floor?—A. Go in the public lobby, in the halls, and then look around and go with the clock to the station where the keys are, in the hall.

The COURT. You carry that clock with you?

The WITNESS. The clock I carry myself.

The COURT. One of those things you carry around your neck?

The WITNESS. The keys I carry around.

Q. Do you examine the passenger hall entrance on each floor?—A. Both halls.

Q. And the freight elevator hall?—A. The same thing. Close windows when open.

Q. Do you do any cleaning on the floors?—A. The floors I don't touch. Have no time anyway.

Q. You do not do any polishing on any floors?—A. On the ground floor, the main floor, and there is a booth there.

Q. Is that where the starter is on duty?—A. That is right.

Q. It is your task to clean that, is it?—A. That is right.

Q. Polish it?—A. Polish it; that is right.

Q. Have you ever observed any fires while you have been on duty?—A. Fires there besides. I was not doing anything myself, but just the emergency, to see if I can prevent it, I see the Fire Department takes care of fires.

Q. You have observed fires while you have been there?—A. Certainly. If the sprinkler does not go ahead of me I call myself sometimes.

Q. You speak too rapidly. Speak more slowly.—A. Usually when the fires start inside the premises the sprinkler calls the Department.

Q. The sprinkler system calls them?—A. The sprinkler system. When it is outside sometimes you would see them first, before the fire was called by the other man, the assistant.

By the COURT:

Q. In other words, if there is a fire occurs inside a tenant's premises, the sprinkler system gets to work?—A. Of course.

Q. That is what it is for, of course. That automatically sends in a fire alarm, does it?—A. That is the way it works.

Q. Then if the fire is outside and not within the ambit of the sprinkler system, that is something that you have to attend to by turning in an alarm yourself; is that right?—A. That is right.

Q. You do not go into the premises of the tenants at night?—A. No. The place is supposed to be closed tightly, by themselves.

By Mr. REYMAN:

Q. Has it ever happened, Mr. Longueria, that you have noticed a fire inside of tenants' premises which was not observed in any manner by the sprinkler system people?—A. Well, there is one, but it is long ago; I don't remember exactly. I think it was on the 7th floor, but I am not sure. It was years ago. I noticed it and I called it myself, the alarm.

The COURT. Called the Fire Department?

The WITNESS. Called the Fire Department.

Q. Have you ever observed any floods on any of the floors?—A. There was a couple of times, like in the basement, years ago.

Q. And how about the upper floors?—A. The upper floors; I don't remember that it happened inside my duty.

Q. Do you remember any on the 19th floor by any chance?—A. So far as fires, I don't know.

Q. Do you also have a porter's job, then, at night in addition to being a watchman?—A. I am doing general work so far.

Q. How many of the elevators do you take care of?—A. The hall front. Five.

Q. All five elevators?—A. Five.

Q. Is it your duty to look after the furnaces during the wintertime?—A. During the winter? No; just in the summer.

Q. Just during the summer?—A. In the winter I haven't anything to do with it. There is no fire down there.

The COURT. What do you mean, there is no fire there in the winter?

The WITNESS. In the winter I have a man to make heat, so as to have hot water.

The COURT. I do not know whether I quite understand that. You mean in the wintertime you do not have anything to do with the furnaces because there are regular firemen?

The WITNESS. They are using an oil system.

The COURT. They have an automatic system?

The WITNESS. No; it is not automatic, but they have a man to attend it, 16 or 17 hours a day, and the rest of the time it remains hot water.

The COURT. In the summertime you have to watch your fire?

The WITNESS. They turn on the coal system, so I have to take care of it inside in the nighttime.

The COURT. You mean you heat the water up during the night?

The WITNESS. With the coal.

Mr. ROZEN. We will develop that by the fireman, your Honor.

The WITNESS. They change the system in the winter.

Mr. ROZEN. We expect to develop that by the fireman who has charge of that.

The COURT. I do not know whether it is of any importance, but I want to know what he talks about.

Mr. ROZEN. As I understand it, your Honor, during the wintertime the heating system is taken care of by firemen, and that supplies the hot water.

The WITNESS. That is right.

Q. But during the summer the heating system is turned off?—A. That is right.

Q. And you go on a coal system?—A. That is right.

Q. Which requires the manufacture of hot water and hot water alone?—A. That is right.

Q. During the time you were on the job it is your duty to take care of that hot water?—A. That is right.

The COURT. In the summertime.

Mr. ROZEN. In the summertime.

Q. How long have you been employed there?—A. Eight years.

Q. Were you there during the strike?—A. I was there since eight years ago.

Q. Were you working during the strike?—A. No; in the strike I was off.

The COURT. That is in 1939.

Q. In 1939 was it?—A. 1939.

Mr. MERRITT. No cross-examination.

JOSEPH MARTINEZ, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. ROZEN:

Q. Where do you reside, Mr. Martinez?—A. What is that?

Q. Where do you live?—A. 404 West 26th Street.

Q. Where are you employed?—A. 463 Seventh Avenue.

Q. What do you do there?—A. Fireman's job.

Q. What are your duties?—A. Well, I go 4 o'clock in the morning first thing and test the plant, to see if there is any water in the boilers. I heat with oil and start a fire.

Q. What time do you report for duty?—A. 4 o'clock in the morning; supposed to start there.

Q. You start the heating system at that time in the wintertime?—A. Yes, sir.

Q. What time do you quit?—A. 12 o'clock.

Q. How many hours a week do you work?—A. 4 to 12.

Q. 46 or 47 hours a week?—A. Yes.

The COURT. If he works from 4 to 12, that is 8 hours.

The WITNESS. 8 hours, sir.

The COURT. 8 hours a day.

By the COURT:

Q. You do not do that on Sunday, do you?—A. On Sunday we work 8 hours with one man off.

Q. You work alternately?—A. One man on Sunday.

Q. You report at 4 and work until when?—A. On Sunday start at 7 o'clock, 8 o'clock, to 4 o'clock. You don't have oil in then.

By Mr. ROZEN:

Q. What kind of a heating plant do you have?—A. The petroleum company built that. It is on oil in the wintertime.

Q. In the wintertime it is an oil burner?—A. Yes, sir.

Q. Is it your duty to see that the oil is fed properly?—A. Yes, sir.

Q. That there is sufficient water?—A. Yes, sir.

Q. During the summertime what do you do?—A. In the springtime, about next May, we change, we change the oil burner for the coal.

Q. You mean you change an oil burner furnace into a coal burning furnace?—A. Yes.

Q. You mean you do that by yourself?—A. Yes; I do by myself.

Q. Is there anybody helping you?—A. Well, I got another man to help me.

Q. Who is the other man?—A. The other fireman.

Q. During the summertime do you have charge of this coal furnace?—A. Yes, sir.

Q. What is the purpose of that?—A. What do you mean?

Q. What is that used for?—A. Well, for the hot water.

Q. Supplies hot water to the tenants?—A. Yes, sir, for the lunch rooms and the barbershop in the building.

Q. Have you always been a fireman in this 463 Seventh Avenue?—A. No, sir.

Q. What were your other jobs?—A. Well, I do some other jobs in the summertime and take care of the boiler and some work upstairs in the halls.

Q. You mean you do porter work in the summertime?—A. Well, last summer he put me relieving the porters for vacation and relieve the night watchmen when they are on vacations.

Q. You relieve the night watchman, do you?—A. Yes, sir.

Q. During the summertime?—A. Yes.

Q. While the night watchmen are on vacation?—A. Yes, three men for the night and four men for the day—the porters.

Q. You mean you relieve the four day porters while they are on vacation?—A. Yes, sir; and I relieved the electrician too for two weeks.

Q. You mean Mr. Silvera?—A. Yes, sir.

Q. You do his work when he is on his vacation?—A. Yes, sir.

Q. Do you also relieve night porters when on vacation?—A. Yes, sir; I relieve the watchmen in the night.

Q. And during the fall do you continue to use the coal furnace?—A. Yes; we continue to use in the fall.

Q. Even during the winter?—A. No; in the winter we use the oil.

Q. You change back to the oil furnace?—A. Yes, sir.

Q. You actually change the furnace from a coal burner to oil burner?—A. Yes; take the grate bars out from the coal burner and put in the oil.

Q. You mean the grate you take out?—A. Yes; take the grates out and put the other burner in.

By the COURT:

Q. Did you used to be a fireman at sea?—A. Yes, sir.

Q. On the ocean and on a ship?—A. Yes, sir; twenty years.

Q. That is what I thought.—A. Yes; twenty years I have been in the ship.

By Mr. ROZEN:

Q. Were you there during the strike of 1939, Mr. Martinez?—A. Yes, sir; when they got a strike my watch was afternoon and the other man be on watch and when I go there everybody be out on the street.

Q. Were you in the building during the strike?—A. Yes; I work in the building because I take the other man's watch and the other man went out on strike, and I work afternoons and I be there at twelve o'clock and everybody be on the street.

Q. Were you providing heat then?—A. I don't know if he make heat. I don't know. I don't go in the building.

Mr. ROZEN. I thought he said the first watch he did. That is all.

Mr. MERRITT. I suppose there is no contention that this building furnishes steam for power to the tenants.

Mr. REYMAN. No; we do not make that contention.

Mr. MERRITT. No cross-examination.

MORTON GURAL, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. ROZEN:

Q. Where do you live, Mr. Gural?—A. 105 Audubon Avenue.

Q. Is that Manhattan?—A. That is Manhattan.

Q. Where are you employed, sir?—A. 463 Seventh Avenue.

Q. In what capacity?—A. Freight operator.

The COURT. Elevator operator?

The WITNESS. That is right.

Q. Do you have any special duties as a freight elevator operator?—A. Just run the freight cars and run the passengers up in the morning and down in the afternoon and at night.

The COURT. You go up on the freight elevator?

The WITNESS. No; we take the passengers in the back down.

The COURT. You mean you take them in the freight elevator?

The WITNESS. That is right.

The COURT. You do not operate the passenger elevators?

The WITNESS. No, sir.

Q. What number car do you operate?—A. We reverse. We run all the cars there.

Q. Did you ever operate car number 2?—A. That is right.

Q. Does car number 2 have any special duties assigned to it and to its operator?—A. We take the rubbish man up who takes the rubbish off the private floors.

Q. When is that done?—A. That is done during the day.

Q. About what time?—A. Oh, between three and four.

Q. When the freight traffic lets up a bit?—A. That is right.

Q. Is the car used exclusively for disposal of rubbish or not?—A. During that time, yes; for about forty minutes.

Q. And you say from the private floors?—A. That is right.

Q. You mean from floors occupied fully by one tenant?—A. That is right, because they are locked at night.

Q. Do you take the rubbish yourself?—A. No; the rubbish company has a man there for that.

Q. And where do your take the rubbish to?—A. They put it on the other public floors.

Q. By public floors do you mean main floors occupied by two or more tenants?—A. That is right.

Q. What happens to it after that?—A. It is taken out at night.

Q. Is the freight elevator littered with refuse after this operation is performed?—A. That is right.

Q. And who cleans that?—A. I do.

The COURT. I don't understand what it means.

The WITNESS. Dirt. I just take a broom and clean the car out.

Q. Are any other cars or freight elevator cars used for any special tasks and the operators who are assigned to them?—A. Number 1 car takes the parcel post in the morning.

Q. Parcel post in the morning?—A. That is right.

The COURT. Which number is that?

The WITNESS. Car number 1.

Q. Will you describe how and what use the parcel post people make of it?—A. That brings the parcel post packages up to the firms, the returned packages.

Q. What do you mean by returned packages?—A. Packages returned with dresses and things.

Q. You mean customers of the tenants who are dissatisfied with those dresses and they are returned to the tenants?—A. That is right.

Q. Is that heavy or light?—A. It is usually heavy on Mondays but the rest of the days it is rather light.

Q. And do you get instructions from the starter or the superintendent—or whom do you get instructions from?—A. From the starter.

Q. And how many men accompany the parcel post returns?—A. Well, I do not know. They usually have more or less men on duty.

The COURT. Are those postmen?

The WITNESS. Yes, sir.

The COURT. In uniform; United States postmen?

The WITNESS. That is right.

Q. And the car is used exclusively for parcel post returns?—A. That is right.

Q. How long does that operation take?—A. For about an hour to an hour and a half.

Q. Is that the same amount of time every day in the week?—A. No; it changes.

Q. As to the average, what would you think?—A. About an hour.

Q. The postman with his assistants puts the packages on your elevator cars, does he?—A. That is right.

Q. Does he carry them in by hand?—A. No; he borrows a truck.

Q. From whom?—A. From the tenants.

Q. Which tenants? Any particular one?—A. Well, usually from National Garment, on the eighth floor.

Q. Were they one of the tenants in the building?—A. That is right.

Q. What floor do they occupy?—A. Eighth floor.

Q. And then you proceed from floor to floor?—A. That is right.

Q. And the elevator is held at the floor while the postman goes out amongst the tenants and makes deliveries?—A. That is right.

Q. Are these elevators ever used for any other purpose except moving merchandise up and down?—A. Up and down, yes, sir; and running the passengers.

The COURT. And passengers?

The WITNESS. And passengers.

Q. When Max Schneck discontinued half of the twelfth floor were the freight elevators used at that time?—A. Yes.

Q. Which car was that?—A. Number 4 freight.

The COURT. Was used? What do you mean? Used for what?

Mr. ROZEN. The elevator car was used to transport.

Q. What was the elevator car used to transport?—A. Well, things he had laying around on the 12th floor and he took them down to the 11th.

Q. Furniture?—A. No; pipes and boards and different stuff, and machines.

Q. Equipment?—A. Yes, sir.

Q. Was that a long or short operation?—A. Well, I don't know. I had it for two hours for two days.

Q. Do you know whether the other elevator operators had that task?—A. I had somebody relieve me but I don't know how long he had it.

Q. Could you tell us about the amount of traffic that goes on in between the floors of Max Wiesen?—A. Well, it is quite a bit.

Q. He occupies how many floors?—A. Five and a half floors.

Q. And what is carried on those freight elevators in between those floors?—A. Dresses.

Q. Finished dresses?—A. Unfinished and finished.

Q. Raw materials?—A. That is right.

Q. Bolts of cloth?—A. That is right.

Q. Trimmings perhaps?—A. That is right. We take silk from the 20th and 21st floors and we take cut goods from the 20th to the 19th, and we take dresses from the 18th and 21st to the 15th, and from 15th up to 18th and 21st.

Q. Do you also take employees between the floors?—A. That is right.

Q. Is that heavy or light?—A. Well, it is kind of half-and-half.

Q. Is there a telephone at the freight starter's post of duty at the bottom of the elevator shaft?—A. Yes; in the stairway.

Q. In the stairway?—A. In the stairway leading from the front hall to the basement.

Q. When it rings is that for the freight elevator starter?—A. To answer; yes, sir; that is the chief's telephone.

Q. By chief, you mean the starter?—A. No; the superintendent.

Q. Mr. Ferdinand?—A. That is right.

Q. But the starter can be called to it?—A. Well, he can answer the phone there, too.

Q. Does he answer it?—A. Yes.

Q. Is that frequently?—A. Once in a while.

Q. Who calls him?—A. Well, it can be outside phones or tenants or anybody.

Q. I am interested in the tenants. Do any particular tenants make any frequent amount of calls to the starter?—A. Yes.

Q. What is the purpose of it?—A. To tell them to send up a special elevator because they have a load waiting to come down.

Q. And then is the elevator sent up?—A. That is right.

Q. Does the starter talk to Mr. Ferdinand asking permission to do that?—A. No, sir.

Q. He is on his own responsibility on that?—A. That is right.

Q. And the elevator is sent up, is it?—A. That is right.

Q. Have you ever been sent in response to any such calls?—A. Yes, sir.

Q. What does the freight starter tell you?—A. Go up and pick up freight on that floor.

Q. Does he say to by-pass the other calls?—A. Well, he sends you up to that particular floor and after you get the load from that floor you come on right down because you are full.

Q. So in effect the tenant has exclusive use of the elevator?

Mr. MERRITT. Now wait a moment on that. I object.

The COURT. That is very leading.

Mr. ROZEN. I am sorry. I withdraw the question.

The COURT. We all see how it is. A person has something to move and he has to move it and he telephones down and asks for the elevator. That is not exclusive use.

Mr. ROZEN. That is for that trip.

The COURT. Oh, well, it is filled up.

Q. Is the elevator filled up on such calls?—A. Yes; we take four racks. We have been very busy with some tenants and some tenants have to wait a half an hour or three-quarters of an hour to get things down or sometimes they come down themselves.

Q. When they make such calls is it usual that they should fill up the entire elevator?—A. Well, we have some firms that have ten or fifteen or twenty racks at a time.

Q. Waiting to come down?

The COURT. How can you put racks on an elevator?

The WITNESS. Four or five.

Q. Do you have any such calls on incoming freight?—A. No.

Q. Will you describe the situation with respect to the movement of freight; that is, cut goods, or goods in the morning?—A. Well, it is quite congested there. The hall gets all blocked up and we have to keep running up and down.

The COURT. It is a busy place.

The WITNESS. Very busy.

Q. Has it ever happened that a truckman has asked you to transport goods or raw materials down without the truckman or his assistant accompanying you in the elevator?

Mr. MERRITT. I object to what the truckmen have to do.

The COURT. What difference does that make?

Mr. MERRITT. They are not in our employ. We are not bound by what they do.

Mr. ROZEN. The point is this, your Honor. I want to bring out that the freight elevator men do on occasion have sole charge of shipments of goods or bunching of racks without the truckman or his assistant or anybody connected with the trucking people being on or with the tenant, to show that the people on the freight elevators are actually assisting in the movement of goods even more directly than merely operating the elevators. In other words, they facilitate the movement of goods.

The COURT. I don't see how that adds to what they do in running the elevators; whether somebody else is in them or not.

Mr. ROZEN. They also watch the goods while going in between floors. I mean it is a little closer tie-up. If you have a locomotive engineer in a cab who holds the throttle and you have a man in a freight car who actually stands and watches the goods coming in, I think the man who watches the goods coming in has a closer connection than the locomotive engineer. That is my theory at any rate, your Honor.

The COURT. I think you have a good theory about the elevator man. You have done all you need to about that. You cannot add anything to it by saying that some times somebody steps off for some reason or other.

Mr. ROZEN. Very good, your Honor. That is all. You may inquire.

Mr. MERRITT. No cross-examination.

The COURT. Is that the end of the employees?

Mr. ROZEN. We have two employees we had not expected to call at this point, but perhaps we ought to.

The COURT. We will have our short recess now.

(Short recess.)

Mr. MERRITT. If your Honor please, I want to put Mr. Gural on the stand for one question.

MORTON GURAL resumed the stand.

Cross-examination by Mr. MERRITT:

Q. Mr. Gural, is it a fact that when you carried freight or passengers for Wiesen between the floors that are occupied by Wiesen, that you do it as part of your normal trip from the basement to the top of the building?—A. That is right.

Mr. MERRITT. That is all.

JAMES CATONE, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. ROZEN:

Q. Where do you reside, Mr. Catone?—A. 2266—29th Street, Astoria.

Q. Where are you employed?—A. 463 Seventh Avenue.

Q. In what capacity?—A. Elevator operator.

Q. How many hours a week do you work?—A. 46.

Q. Could you describe the traffic that goes on in the passenger elevators?—A. Heavy.

Q. Could you describe the traffic that goes on in the passenger elevators in between the floors of Wiesen?—A. I don't know what you mean.

Q. Is it heavy or light?—A. It is pretty heavy.

Q. What about in between the floors of Max Schneck?—A. Well, we do not stop there. We have nothing much between Schneck there.

Q. What do you carry in between the floors of Max Wiesen?—A. Carry there passengers and sometimes we have to have some of those ready made dresses and pieces of goods brought up and down.

Q. You carry dresses, you say?—A. I do not carry them but employees carry them on their arms from floor to floor.

Q. On the passenger elevators?—A. Yes, sir.

Q. Also carry piece goods?—A. Piece goods, too.

Q. From floor to floor?—A. In between the floors; yes, sir.

Q. Do they carry trimmings?—A. Everything; all that line of business they got.

Q. Do they carry records, business records of one kind or another?—A. Yes, sir.

Q. Books?—A. Books; yes.

Q. Pay-roll records, perhaps?—A. Pay-roll records, too.

Q. Do any of the passengers carry out dresses with them which they have bought at the various tenants' places of business?—A. Well, I would not know that because they usually come in with boxes and go out with boxes. I don't know whether they buy any there or not.

The COURT. I suppose they would be samples, wouldn't they, anyhow? This is all wholesale.

Mr. ROZEN. Not necessarily, your Honor, as I understand it.

In other words, what I understood from this witness in conference, they developed what they call a box trade; small retail people come in and get two or three at a time.

The Court. They are buying from a wholesaler?

Mr. ROZEN. They are buying from a wholesaler but they are not samples, but they are all for regular disposition in the retail trade.

Q. Does that refresh your recollection, Mr. Catone?

Mr. MERRITT. I do not think you are in a position to try to refresh his recollection. You have not exhausted it.

The COURT. No. Go ahead and ask him questions.

Q. Do you know of the phrase known as the box trade, Mr. Catone?—A. What?

Q. Do you know what they mean when they say "box trade"?—A. Yes.

Q. Describe that, please.—A. People comes with boxes and buy one or two dresses and go out again and go from floor to floor and we have to take them up and down.

The COURT. They are for New York City?

The WITNESS. They are New York buyers and out of town buyers both; they come in and buy the same way.

The COURT. Out-of-town buyers get two dresses?

The WITNESS. Well, they probably buy a half dozen; two in a box. You would not know how many.

The COURT. You do not know how many, do you?

The WITNESS. I do not know; no, sir.

Q. How long have you been employed there, Mr. Catone?—A. I have been there twelve years.

Q. Uninterruptedly?—A. Well, once.

Q. What does that mean?—A. I was fired by one of the tenants.

Q. I did not quite catch that.—A. I was once fired by one of the tenants.

Mr. MERRITT. I object to that as calling for a conclusion.

The COURT. What has that to do with it?

Q. Were you taken back again eventually?—A. Yes, sir.

The COURT. All right.

Mr. ROZEN. I would like to inquire into that more fully, if your Honor please.

The COURT. This is not a labor relations board matter.

Mr. ROZEN. No, it is not, but we contend here that these elevator men are engaged in commerce, or in the production of goods for commerce or in occupations or processes necessary for the production of goods for commerce, and one of the points the defendant has raised, in reliance upon one of the cases called the Killingbeck case is since the employer is not engaged in the production of goods for commerce these elevator men and maintenance men cannot possibly be engaged in commerce. The Killingbeck case advanced if an elevator man or carpenter in that case was employed by a tenant or a manufacturer there might be coverage, but since he was employed by the owner, Judge Untermyer in that case says there cannot be coverage.

The COURT. That is the Appellate Division.

Mr. ROZEN. Yes, your Honor. We are trying to show here, and this testimony is directed to show, that in fact the tenants do exercise some degree of control and that under our broad definition of employer or employee, which says to permit or suffer to work—that is right in the statute, your Honor—that this witness—particularly the large tenants who have large space can, on any whim or fancy of their own, if they please, cause, or be instrumental in causing, an employee to be fired, and as this witness has already testified, he was fired by a tenant—he says. Of course he was fired on the complaint of a tenant, and I want to show your Honor that in a building of this kind it is in the nature of a cooperative venture. All the tenants pay rent. That is not, of course, the ordinary true cooperative building, but in this complicated day ——

The COURT. It would be very unfortunate if it were a truly cooperative building.

Mr. ROZEN. I do not quite understand.

The COURT. I say it would be very unfortunate as they were always having trouble with cooperative buidings.

Mr. ROZEN. What I am trying to develop with this witness and to show is that the tenants do exercise some control.

The COURT. I sustained objections to that sort of evidence yesterday I thought. It did not seem to me that it had anything to do with this case. Of course the tenant has to make a complaint and it has to go through somebody else before it would be acted on. The tenant does not do it himself. It merely is a discontent expressed by somebody and passed on to the superintendent or the manager.

Mr. ROZEN. That is true.

The COURT. And so you cannot say that the tenants discharged them. Of course if a person is a very large tenant his complaints would have more emphasis than a very small one. That is all it amounts to.

Mr. ROZEN. That is true, but if your Honor would let me develop who this tenant was and what his say-so was, you could see that even a small tenant perhaps can, upon an occasion, unjustifiably cause the discharge of an employee.

The COURT. How does he know whether unjustifiable or not? Of course this fellow would think it was unjustifiable, but you would have to have the other tenants and try that issue.

Mr. ROZEN. I do not intend to have that issue raised but I merely want to explain those facts so your Honor can see that the tenants can cause the discharge of an employee whether justified or unjustified.

The COURT. I think I know that without any evidence on it.

Mr. ROZEN. Of course if your Honor knows that——

The COURT. I think one could realize that would be possible in any building, however run A very large tenant, or tenant with affairs, could perhaps cause some discharge. I have had a little experience on that myself.

Mr. MERRITT. Or a visitor who happened to know the landlord very well could, if he thought he was discourteously treated.

Mr. ROZEN. That is the very thing I want to show; that if a visitor came in and said, "This man has been impertinent," he might not be fired but he might be warned, but if a tenant came in and said that, he might be fired on the spot. I make my proffer of proof.

The COURT. Well, I will exclude it. Let us go on to something else. You are very thorough, but almost too thorough, I think.

Mr. ROZEN. I am trying to get the facts before your Honor. That is all I have with this witness. You may inquire, Mr. Merritt.

Cross-examination by Mr. MERRITT:

Q. Isn't it a fact, as testified to by Mr. Gural, that when you carry passengers and freight between the floors of Wiesen, for instance, that it is part of your regular trip?—A. Yes, sir.

Mr. MERRITT. That is all.

JULIO DEVALLE, called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. ROZEN:

Q. Where do you live, Mr. Devalle?—A. 549 West 129th Street.

Q. Where are you employed?—A. 463 Seventh Avenue.

Q. In what capacity?—A. Passenger elevator operator.

Q. How many hours a week do you work?—A. 46 hours a week.

Q. How long have you been employed there?—A. Eleven years.

Q. Were you there during the 1939 strike?—A. Yes.

Q. Were you working during the strike?—A. No; I was out.

Mr. ROZEN. Now, your Honor, with respect to Mr. Devalle, I want to make the same proffer of proof that I made with respect to Mr. Catone; that is to say, he also was one of the employees in the building who was discharged on the complaint of a tenant and later rehired, and is now employed, and I would like to develop the circumstances of his discharge and rehiring. I assume your Honor will adhere to the ruling you made with regard to Mr. Catone?

The COURT. Yes.

Mr. ROZEN. That is all.

Mr. MERRITT. No questions.

The COURT. I am feeling full of compassion for some of these tenants who are here. Is that all of your employees?

Mr. REYMAN. We likewise are full of compassion for the tenants and we are trying to do all we can to save their convenience and time.

The COURT. Let us plan a little about it. Is there one particular tenant we could take on here and deal with between now and four-thirty, say?

Mr. ROZEN. I think there is one, your Honor, Max Wiesen.

The COURT. If Max Wiesen is here, let him come up here and we will try to get through with him this afternoon. I have to go fairly promptly myself but we will try to get through with him this afternoon. Then you can let the other people go.

Mr. ROZEN. That is right. The rest of the tenants are excused if there are any others here. Of course employees may leave if they wish.

FAY SIMS, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Mr. MERRITT. Your Honor will recall that we conceded that these tenants are engaged in the production of goods for interstate commerce.

The COURT. Certainly I remember that. I thought there was no question about it.

Mr. ROZEN. As a matter of fact, they do more than that, your Honor. While they have conceded the production of goods in commerce they have conceded the tenants are engaged in commerce by the words of the answer.

Mr. MERRITT. We won't be technical about it. There is no question about it that under the decision of the Supreme Court that these people who are manufacturers selling in interstate commerce would come under the Act. The only question is whether these strange people, any of them do, or, if so, how many of them come under the Act.

Mr. ROZEN. All I wanted to point out to your Honor is that under our Act coverage is predicated on two possibilities; that is, (1) interstate commerce and (2) production of goods for interstate commerce. These tenants not only produce for interstate commerce but, under our theory of the Act, are engaged in interstate commerce as well. In other words, they fit both parts.

The COURT. But you are not only dealing with their employees but you are dealing with employees of a building in which these tenants are tenants.

Mr. MERRITT. That is what I have said.

Mr. ROZEN. But Mr. Merritt said nothing about the tenants being engaged in interstate commerce.

The COURT. I conceive if you are within the statute on their account, what difference does it make whether you are in on both counts or not?

Mr. ROZEN. It makes the case that much stronger. In getting these maintenance employees covered by the statute we have two barrels; in commerce or producing for commerce.

Mr. MERRITT. We concede Max Wiesen is engaged in producing goods for commerce.

Mr. ROZEN. We don't need that concession because it is in the answer already.

The COURT. All right. Examine your witness. Is this Max Wiesen or Mrs. Wiesen who is here?

The WITNESS. I am the office manager for Max Wiesen & Sons.

Direct examination by Mr. REYMAN:

Q. Where do you live, Miss Sims?—A. 245 East 180th Street.

Q. You have just said you are the office manager for Max Wiesen?—A. Yes, sir.

Q. How long have you been office manager?—A. Six years.

Q. Can you tell us how many employees Max Wiesen employs now?—A. At the present time we have 700.

Q. Is that about the usual number?—A. Well, it has been more or less the usual number, for the past two and a half years.

Q. Will you describe, just briefly, the nature of the business of this corporation?—A. Well, we manufacture our own dresses. We buy materials and manufacture them and ship them to customers; to people who want to buy them.

The COURT. Is this a corporation, Max Wiesen?

The WITNESS. Yes, sir.

The COURT. What is it called?

The WITNESS. Max Wiesen & Sons Company, Inc.

Q. And we understand, Miss Sims, that the place of Max Wiesen occupies five floors within the Arsenal Building?—A. That is right, sir.

Q. Will you give us the numbers of the floors?—A. We occupy from the 17th through the 21st and part of the 15th.

Mr. REYMAN. May I have this document marked for identification.

(Marked "Plaintiff's Exhibits 19, 20, and 21" for identification.)

Q. Miss Sims, in general, as office manager, you are familiar with the figures of the business in respect to business done and business transacted, in dollars, and so on?—A. Yes, sir.

Q. And do you have in your charge the usual documents in connection with the operation of the business? By that I mean leases, rent bills, and that sort of thing?—A. Yes.

Q. How many people do you employ in the office?—A. Directly in my office I have 26.

Q. And how many of those people are engaged in work directly connected with the operation of the business?—A. They are all connected directly with the operation.

Q. And they are all under your control?—A. That is right.

Q. You were asked to bring certain documents with you by subpoena, were you not?—A. I was.

Q. Do you have them with you?—A. I think so.

Q. You were also asked by some of us to give us certain figures, before today?—A. Yes.

Q. I show you——

Mr. MERRITT. May I see what you show her?

Mr. REYMAN. I am sorry.

The COURT. You had better mark them for identification.

Mr. REYMAN. They are already marked for identification.

The COURT. Then show them to him.

Q. I show you, Miss Sims, a letter dated March 25, 1941, which has been marked Plaintiff's Exhibit 19 for identification, purporting to bear your signature. Did you prepare the figures shown on that [handing to witness]?—A. I did not prepare them myself. Our bookkeeper prepared them for me. I do not handle the books myself. But they are the proper figures, I am sure.

Q. You can vouch for their accuracy?—A. That is right.

Q. They are prepared under your direction?—A. That is right.

Mr. REYMAN. I offer them in evidence.

Mr. MERRITT. No objection.

(Plaintiff's Exhibit 19 for identification received in evidence.)

Q. I show you also a sheet of paper marked Plaintiff's Exhibit 20 for identification. It is undated and——A. I told Mr. Rozen's secretary, or the young lady that is with him, that this figure was for one month instead of a year. I corrected it on the other sheet. The pay-roll is correct. The sales is correct, but this is incorrect. It is for one month instead of a year.

Q. The figures were prepared under your instructions, shown on this sheet?—A. That is right.

Q. And that is your signature?—A. That is right.

Q. With respect to the typewritten figures——

Mr. MERRITT. Wait. Why don't you take it and make the correction? You have my permission. Then you won't have to do all this correcting.

The COURT. Yes.

Mr. REYMAN. I do not know what the correct figure is.

The WITNESS. The correct figure is on Exhibit 19, I believe.

The COURT. And Plaintiff's Exhibit 19 is in. Give it to her.

The WITNESS. Yes, that is the correct figure, sir. Yes; you see this is the figure [indicating].

Mr. REYMAN. If I can proceed I am sure I can stumble through somehow.

The COURT. But what is the use going over the figures twice?

Mr. REYMAN. These are different figures, if the Court please.

The COURT. Some of them must be the same. Miss Sims says one of them is not the right figure.

Mr. REYMAN. She just picked out an isolated figure, and if I could go ahead I could straighten this out.

Mr. MERRITT. But I think it is unnecessary to have a lot of examination upon a general issue here as to incorrect figures or incorrect entries.

Mr. REYMAN. I think so, too.

Q. Referring again, Miss Sims, to Plaintiff's Exhibit 20 for identification, and to the typewritten figures thereon headed by Rent and W. and S., were these figures prepared under your direction?—A. Yes, sir.

Q. And are they accurate and authentic?—A. Yes, sir; they are accurate and authentic. That is right, sir.

Q. Going back to the sales figures, which one of these figures is incorrect?—A. This one [indicating].

Q. The figure $54,000?—A. Yes, sir; that was for one month instead of a year.

Q. Referring back now to Plaintiff's Exhibit 19 which is in evidence, what here is the correct figure according to this? With respect to the yearly figure shown, what figure is that?—A. 501.

Q. $501,042 represents the year?—A. That is right.

The COURT. Is that rent?

The WITNESS. No, that is for the New York State sales.

MR. REYMAN. Your Honor has not seen the exhibit.

The COURT. Have they not conceded these people were in interstate commerce?

The WITNESS. Yes.

The COURT. Hasn't the other side conceded they were in interstate commerce, under the ruling? Didn't you?

MR. MERRITT. I concede they are subject to the Act and producing goods for interstate commerce.

MR. REYMAN. That is exactly it, and we cannot see, if your Honor please, that they have conceded that the employees in question here are engaged in the production of goods for commerce or the occupations are essential.

The COURT. Of course they have not conceded that they themselves are so engaged.

MR. REYMAN. That is true.

The COURT. Certainly they have not conceded that. That is the question in issue. But they concede these folks, Wiesen and Sons, are in interstate commerce. Then the question is whether the penumbra that surrounds them, the assistants and other people, the people who operate those goods, are in interstate commerce. That is the whole question.

MR. REYMAN. That is right.

The COURT. There is no reason for going into details as to Max Wiesen & Sons.

MR. REYMAN. I am not going into it in any detail whatsoever, other than the fair fact that the business, the volume of Max Wiesen & Sons, the amount of sales, the amounts of rent paid, and the fact that they do pay for water and other services.

The COURT. Where is the lease?—That is the best evidence.

Mr. REYMAN. I was coming to it in just a moment.

The COURT. All right, that is what I want to see, the lease. They can say whether that is a typical lease or not, and then you have the whole thing.

Mr. REYMAN. May I offer Plaintiff's Exhibit 20 for identification in evidence.

The COURT. Surely. I do not know what you call it. What should it be called?

The WITNESS. The rent per month on water and sprinkler charges.

Mr. MERRITT. Before this is received in evidence I would like to have it appear clearly on the record that the figure on this Plaintiff's Exhibit 20 New York State Sales $54,000 is incorrect and represents only sales for a given month, and that the proper figure for the New York State sales for the entire year is $501,042.

The WITNESS. That is right, sir.

The COURT. That is right. Then does it give the total sales?

The WITNESS. It does.

The COURT. The total sales in interstate?

Mr. MERRITT. Yes.

The COURT. I do not care just what they are.

Mr. REYMAN. That is offered in evidence, I take it, without objection.

Mr. MERRITT. No objection.

(Plaintiff's Exhibit 20 for identification received in evidence.)

(Plaintiff's Exhibits 22, 23 and 24 marked for identification.)

Q. I show you, Miss Sims, Plaintiff's Exhibit 21 for identification, purporting to bear your signature [handing to witness], and ask you whether or not that was prepared under your direction from the records of Max Wiesen & Sons?—A. Yes, sir.

Q. And will you explain, please, what the entries mean, electricity and so on, on there? What does the sheet purport to show?—A. How much we paid per month for electricity consumed.

Q. And to whom do you pay the amount monthly?—A. We pay that to Spear & Company.

Mr. REYMAN. That is offered in evidence, if your Honor please.

Mr. MERRITT. No objection.

(Plaintiff's Exhibit 21 marked in evidence.)

Mr. REYMAN. I have called for and counsel on the other side has produced, if your Honor please, three forms, three separate documents entitled "Lease," now marked Plaintiff's Exhibits 22 for identification, 23 for identification and 24 for identification. They I take it are the actual leases now in effect between Arsenal Building Corporation and Max Wiesen & Sons Company.

Mr. MERRITT. That is true. But if these documents are to be offered in evidence I do want some understanding whereby you will substitute copies.

The COURT. Certainly you have photostat copies to be substituted. I will order that.

Mr. MERRITT. And the same is true as to the pay roll records.

Mr. ROZEN. Well, we cannot have these photostated, they are too voluminous, your Honor.

The COURT. They can be photostated.

Mr. ROZEN. They have the originals there somewhere. Have you not?

Mr. MERRITT. No, we have not.

Mr. ROZEN. They are duplicates. The Arsenal Building Corporation have them. It would be burdensome to photostat all these.

The COURT. No, it would not take 25 minutes to go downstairs to the United States Attorney's office and have them photostated.

Mr. ROZEN. I am not quite sure they will do it.

The COURT. I will order them to.

Mr. REYMAN. We will have them photostated and the originals returned to the defendants. Is that correct?

Mr. MERRITT. That is right.

The COURT. It won't cost you anything to have it done in the United States Attorney's office.

Mr. REYMAN. We will have it done. These are offered in evidence, your Honor, referring now to the documents marked——

The COURT. A typical lease, between whom?

Mr. MERRITT. These are not typical, but are the Wiesen leases.

Mr. REYMAN. The first one, Plaintiff's Exhibit 22, between Arsenal Building Corporation and Max Wiesen & Sons Company, Incorporated, dated January 22, and is for the 21st floor. As appears on the outside of the lease, the rental is shown per year, and so on. Plaintiff's Exhibit 23 is between the same parties, dated August 5, 1940, and is for the 17th, 18, 19th and 20th floors.

Plaintiff's Exhibit No. 24 is between the same parties, dated August 5, 1940, and is for 15th east—which I take it means the east side of the 15th floor.

The WITNESS. That is right.

Mr. REYMAN. These are offered in evidence and I take it are received.

Mr. MERRITT. There is no objection.

The COURT. There is no objection. They are received, all of them.

(Plaintiff's Exhibits Nos. 22, 23, and 24 for identification received in evidence.)

Q. Referring to Plaintiff's Exhibit 22, there is attached to it a letter dated January 29, 1940—a copy of a letter, rather. If you will examine it, Miss Sims [handing to witness].—A. Yes, sir.

Q. Referring to creation or installation of enough alternating current in the premises to make it possible that all machinery and lights and so forth shall be run under alternating current; do you know whether or not that change was made?—A. Yes.

Q. You were asked to make up from your records the total sales of Max Wiesen for the year 1940. Do you have that with you?—A. Yes, sir.

Q. And the total sales shipped out of the State of New York?—A. I could not give you that for 1940.

Q. Not for 1940?—A. No, we have not got that quite completed; but I could give it to you for 1939.

Q. All right, will you?

Mr. MERRITT. We have it for 1939.

Mr. REYMAN. I do not know that we have.

The WITNESS. Yes, it is an exhibit. It is already there.

Mr. MERRITT. Why go over it again?—A. For 1939 it is here. I could not have it ready for 1940. I have the gross sales and net sales, but not segregated for New York State.

Q. Will you state the gross sales, which include I take it both in-state sales and out-state sales, for 1940?—A. That is also listed in one of the exhibits, sir. I would rather not say it out loud, if you don't mind, but it is right there [handing paper to Mr. Reyman].

The COURT. What difference does that make when they concede that they are in interstate commerce? I think it is a lot of imposition on commercial people to have their sales put in like that.

Mr. REYMAN. We are perfectly willing to keep the information confidential.

The COURT. How can you if you file them in court?

Mr. REYMAN. We see no reason why it should be.

Mr. MERRITT. It is already in evidence, in Plaintiff's Exhibit No. 20.

Mr. REYMAN. I will withdraw the question.

Q. As office manager, Miss Sims, do you have any dealings with Mr. Ferdinand, the superintendent of the building?—A. No, sir.

Q. Who in your establishment asks, if asking is done, for porter help, special elevator help or anything like that?—A. We have our own porters. It is only occasionally, if the plumbing should go out of effect, that we might call Mr. Ferdinand and have one of his men repair it, that is all.

Q. Who would call Mr. Ferdinand?—A. Well, generally I would, or Mr. Perlstein, the supervisor.

Q. Have you had occasion to call Mr. Ferdinand recently for defective plumbing?—A. Why, one of the lavatories was out of order and we called him up just a couple of weeks ago, and that was repaired.

Q. Max Wiesen is generally regarded as a large manufacturer, is he not?—A. I believe he is one of the largest, sir.

Q. And there is quite a volume of material coming into the premises?—A. Yes, sir.

Q. To be worked on, every day; is that right?—A. Yes, sir.

Q. Will you state how that material comes into your premises?—A. Probably through the freight elevators up to our 20th floor.

Q. After it gets to the 20th floor what happens to it, Miss Sims?—A. The cutting goes on there. It is received in the piece goods department, the material, and then handed out to the cutting department, and the cutting tickets are handed to the general manager.

Q. After it leaves the cutting department where does it go?—A. Goes down to the 19th floor to be operated on.

Q. What is done there?—A. The operation, Sewing machines. They operate.

Q. Are the dresses, or whatever it is that is manufactured, completed after the material comes in to Max Wiesen's?—A. I do not quite understand you, sir.

Q. Is all of the manufacturing done on the premises of Max Wiesen?—A. Yes, sir.

Q. After the arrival of the goods?—A. Yes, sir.

Q. Is any finishing done outside before the finished product is—A. The only finishing done is if we want buttons made or embroidery done on the material. Otherwise it is all manufactured on our own premises.

Q. Do you do buttonholing on your own premises?—A. Yes. There are very few buttonholed dresses, you know. We have zippers.

Q. I will have to take your word for that. How much of your sales are to out-state customers, roughly?

The COURT. Do you want the percentage?

Mr. REYMAN. Yes.

Mr. MERRITT. You have the figures for 1939.

Mr. REYMAN. I realize they are there for 1939.

The COURT. He wants the percentage; is that the idea?

Mr. REYMAN. That is right.

The COURT. The approximate percentage of sales out of the state.

Q. Now this is 1941. Approximately what is the percentage of out-state sales?

The COURT. Just approximately. Nobody is asking you for the exact amount.

A. The percentage would be about 70 per cent, I imagine.

Q. Did you bring with you your pay-roll records for the year 1940 showing total wages paid?—A. I brought the figure of the total paid.

Q. The total figure?—A. That is right.

Q. Will you give it to us?

Mr. MERRITT. It is down here, for 1940.

A. It is all right if I show that to you? There are tenants here and I would not want to call it out loud.

Mr. MERRITT. It is already in Plaintiff's Exhibit 20.

The COURT. It is already in the exhibit.

The WITNESS. Yes, that is the exhibit.

The COURT. Yes, you can show that to him.

The WITNESS. Thank you, Judge [handing paper to Mr. Reyman].

Mr. REYMAN. I will withdraw that question.

Q. Let me ask you one other question. Who in Max Wiesen & Sons Company besides yourself negotiates leases and deals with the building management with respect to the maintenance employees employed there?—A. I don't think we have anything to do with the maintenance employees there, but I mean Mr. Perlstein would contract for the lease.

Q. Who is Mr. Perlstein?—A. He would have nothing to do with the maintenance employees.

Q. Who is Mr. Perlstein?—A. He is the general supervisor.

Q. Have you ever seen, during the time you have been employed there, any maintenance employees employed by the building on the premises of Max Wiesen?—A. Occasionally, yes.

Q. Have you seen them about the building?—A. I have seen them about the building, yes.

Q. Besides the occasion you called Mr. Ferdinand for a leaking faucet, have you ever had occasion to call on the building for porter assistance?—A. I occasionally call on one of the men to take something down to be burned, down to the incinerator.

Q. What would it be he would take down to have burned?—A. Records, duplicate records, that we destroy after a couple of months.

Q. There are public hallways, are there not, outside of the floors, or on the floors beside the elevators, the floors occupied by Max Wiesen?—A. They are not public, no. They are only used by people who come up to us. None of the other tenants would use it.

Q. Buyers come up to your place of business, do they not?—A. Yes.

Q. How do they get there?—A. They get in through the passenger elevator, naturally.

Q. I should think so, yes. Do buyers and others come up to Max Wiesen's?—A. If you want to call it public, you may be right.

Q. Do they come onto the premises of Max Wiesen when they step from the elevator, or is there a hallway?—A. The lobby seems to belong to us, because nobody else occupies that floor.

The COURT. They have whole floors, and the elevators have to go up through there.

The WITNESS. I don't imagine anybody unless they want to come to our premises would stop there.

Q. Have you ever seen the handyman or mechanic employed by the building on the premises of Max Wiesen?—A. I do not recall. I may have seen him around. I do not know for what purpose.

Q. Do you know what he looks like?—A. There are a few of them. I do not know one from the other, whether they are freight elevator men, handymen or firemen.

Q. Have you ever seen any of them in the premises of Max Wiesen?—A. Oh, yes, I have seen them.

Q. What are they doing there, when you see them?—A. I could not tell you. I see them.

Q. Are you isolated there from everyone else in your office?—A. I would not say that.

Q. What would you say?—A. I mean everybody can come into the office, and it is open in parts. We are right near the showroom.

The COURT. You mean your own offices are in a place where you would see people?

The WITNESS. Well, we see people.

Q. Have you ever complained to the management of the building or to Mr. Ferdinand with respect to the activities of any of the maintenance men there?—A. No. Personally I have not.

Q. Do you know whether or not complaints have been made?

Mr. MERRITT. I object to that as incompetent, irrelevant and immaterial.

A. I would not know.

The COURT. I will sustain the objection.

Q. Who supplies the hot water for Max Wiesen, used in the lavatories, if you know?—A. I would not know. It comes from the building.

Q. It is not made hot on the premises of Max Wiesen?—A. No, we have no furnaces there.

Q. Who supplies the heat, the building or Max Wiesen?

Mr. MERRITT. Do you mean the radiator heat?

The COURT. The lease will tell you that.

A. Obviously the building.

Mr. REYMAN. Who will tell me that?

The COURT. The leases. You have put the leases in.

Mr. REYMAN. Yes.

The COURT. Those will tell you that.

Mr. REYMAN: It may tell me that; yes, sir.

Mr. MERRITT. I want to make this clear. Is it radiator heat, heat having to do with the manufacture of garments, or what is it?

Mr. REYMAN. Radiator heat.

The WITNESS. We get it from the building, and we have no furnaces on our floor. We do not make any hot water, steam or anything. We are supposed to get it according to our lease.

Q. How long did you say you were employed there?—A. Many years.

Q. Do you recall a strike in 1939?—A. Yes, sir.

Q. Of the building employees?—A. Yes, sir.

Q. Do you recall that the elevators were not running, the passenger elevators?—A. Yes, sir.

Q. Were the freight elevators running?—A. Not that I know of.

Q. I beg your pardon?—A. Not that I know of, although I never go around the freight side.

Q. Were you there during the cessation of work by these employees?—A. I was in the building, but I didn't go up to the office.

Q. You did not go in at all?—A. No, I would not walk up 18 floors.

The COURT. You are a sensible woman.

The WITNESS. Thank you.

Q. Do you know whether or not of your own knowledge any of the officers or employees of Max Wiesen worked during that time?—A. Yes, there were a couple of men that went up.

Mr. REYMAN. That is all.

Mr. MERRITT. No cross-examination.

The COURT. Then this young lady need not come back tomorrow; is that right?

Mr. MERRITT. That is correct.

The COURT. Is that right, she need not come back tomorrow?

Mr. REYMAN. She may be excused as far as I am concerned; yes, sir.

The COURT. Do you think you are going to get through your evidence tomorrow, probably.

Mr. REYMAN. We hoped so. The Court will recall that the minutes of pre-trial show we asked for certain information with respect to the business of the tenants, dollar volume, in-state and out-state purchases and sales. There was some discussion before Judge Knox, and it was agreed that the information we wanted we should try to get through a form of questionnaire sent to the 40——

The COURT. Did you send the questionnaire?

Mr. REYMAN. We sent the questionnaire; yes, sir.

The COURT. I was wondering what had become of the questionnaire.

Mr. REYMAN. Now we have furnished counsel on the other side with a copy of the chart showing the basic information called for. We have the original questionnaire as answered available for examination. It will save a great deal of time, of course assuming the admissibility of the data we wish to offer——

The COURT. Is that under the ruling with respect to interstate commerce and the production of goods for interstate commerce?

Mr. REYMAN. Yes, we want to show your Honor, shortly, that the tenants are engaged in commerce and the production of goods for commerce. We want to give the facts by

actual figures to show that is so. It seems to us it can be done in simple form.

The COURT. If they have not admitted it already I should think it could be done. Have you seen these things?

Mr. MERRITT. I have not.

The COURT. Show them to him.

Mr. REYMAN. Yes, Mr. Clifton has had them since last Friday.

The COURT. Who is Mr. Clifton?

Mr. MERRITT. My associate, and a member of this bar.

Mr. REYMAN. He has had them since last Friday. We would like to make an offer of proof tomorrow morning based on this. We would like to afford the other side the opportunity to examine the questionnaires, to show them the source of our information, so that so far as the actual figures here are concerned it won't take up the time of the Court.

The COURT. You can have the courtroom opened by 10:30. Then you could look over them and make up your mind about the matter.

(Adjourned to Wednesday, April 2, 1941, at 11 a. m.)

NEW YORK, *April 2, 1941, 11:00 a. m.*

Trial resumed.

Mr. REYMAN. Since we recessed yesterday afternoon, your Honor, we have consulted with counsel on the other side with respect to certain proof which we are convinced belongs in the record; that is, we had stated at the pre-trial that we wanted to ask some questions of tenants, chiefly as to the amount of their business and the amount of business that is done interstate, and the number of employees they have, and that sort of thing. We have mentioned that we did circulate some questionnaires to the tenants, and from the questionnaires we have compiled a chart.

The COURT. Yes. I was going to say that is something like an accountant's chart.

Mr. REYMAN. Miss Cottrell was very thorough and did a fine job.

The COURT. It is just like an accountant's chart in summarizing the whole situation, and I often admit those things as illustrative exhibits, subject to correction. That is really the best way to do it. It is an excellent way to draw things together and put things in focus for the Court.

Mr. REYMAN. That is what we tried to do.

The COURT. Have you had a chance to look at this, Mr. Merritt?

Mr. MERRITT. I have, and I am prepared to make a statement to the court.

The COURT. All right.

Mr. MERRITT. We have examined this schedule which it is proposed to offer in evidence. We appreciate that there has been an earnest and conscientious effort to arrive at the facts therein set forth. There are some inaccuracies, I am told, but by and large they do not affect the over-all question which your Honor will have before you when you come to decide this case. They add nothing and subtract nothing, as we view it, from our concession that these tenants are engaged in the production of goods for interstate commerce. They unduly elaborate and detail the situation, but after giving the matter consideration I have reluctantly come to the conclusion to accept that in evidence, to ride upon its face, upon the understanding that there is to be no oral evidence taken from any of the witnesses to cover the same ground.

Mr. REYMAN. I have told Mr. Merritt, and I am telling the Court, that that is agreeable to us. We want to have before the Court a picture of the interstate business. We think that that chart will tell the story and it is offered in evidence, your Honor, as Plaintiff's Exhibit 25.

Mr. MERRITT. I might also say, as a safeguard to any possible question that might arise in other connections, that this is accepted as proving evidence in respect to those matters for the purposes of this case only.

The COURT. Yes, I will admit this for the purpose of this case only, and I will admit it as what I have come in the habit of calling, perhaps wrongly, illustrative exhibits, which is juridically comparable, we will say, to the work of an accountant who summarizes a lot of accounts which the Court, or even a jury, would find it almost impossible to work out. That is the basis on which we will receive it, so it is in evidence, but it is in evidence on that understanding only; that it only deals with this particular case. Does that cover it?

Mr. REYMAN. Yes. And I may say for the benefit of the other side that the inaccuracies, if any, are due to the great amount of work necessary to get accurate figures for the periods represented. The tenants are busy at this time and it was rather difficult to get the information, but, as Mr. Merritt says, the over-all figures are substantially correct.

The COURT. This is a case of looking at the forest instead of the trees, I think.

(Marked "Plaintiff's Exhibit 25.")

BENJAMIN STERNSCHUSS, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. ROZEN:

Q. Where do you reside, Mr. Sternschuss?—A. 1000 Grand Concourse.

Q. Bronx?—A. Bronx, New York.

Q. Where are you employed?—A. National Garment Company, 463 Seventh Avenue.

Q. Are they a tenant in 463 Seventh Avenue?—A. Yes, sir.

Q. What floor are they on?—A. Eighth floor.

Q. How much space do they occupy?—A. A trifle more than fifty per cent.

The COURT. Of the floor, you mean.

The WITNESS. Of the floor.

Q. Have you your lease here?—A. Yes; I have it; this year or last year?

Q. You have both?—A. The current lease and the one just expired.

Q. Have you any other leases with you?—A. No.

Mr. ROZEN. Will the clerk mark for identification both leases as one exhibit, your Honor?

The COURT. No; I think you had better mark them separately.

(Marked "Plaintiff's Exhibits 26 and 27" for identification.)

Mr. ROZEN. Would you like to look at them?

Mr. MERRITT. Are you going to offer them?

Mr. ROZEN. Yes.

Mr. MERRITT. I would like to look at them before you offer them.

The COURT. I think you had better arrange to have photostatic copies put in. These people do not want to surrender their basic documents. But you can do that very easily.

Mr. ROZEN. Exhibit number 26 for identification is the lease whose term commences February 1, 1940, and Exhibit 27 for identification is the lease whose term commences February 1, 1941.

Q. Are those leases which I show you the leases which you have with the Arsenal Building Corporation?—A. Yes; those are the leases.

Mr. ROZEN. I offer them in evidence.

The COURT. Is there any objection, Mr. Merritt?

Mr. MERRITT. No objection.

(Plaintiff's Exhibits 26 and 27 for identification received in evidence.)

Q. How long have you been in the dress goods business, Mr. Sternschuss?—A. Eighteen years.

Q. How long have you been employed by National?—A. Eighteen years.

Q. In what capacity are you there employed now?—A. Production man.

Q. Has the National Garment Company always been known by that name?—A. Since it has been in business?

Q. Yes.—A. No; when it first went into business it was known as Abertine Brothers.

Q. In what general location has National Garment Company, or its predecessor, occupied space during its business life?—A. In the general location of the garment district, around 34th Street and Seventh Avenue and Broadway, in that neighborhood; a few blocks below and a few blocks above.

Q. How long did you say you had been in the dress business?—A. Eighteen years.

Q. By the time you entered into the dress business, Mr. Sternschuss, had the area that you describe come to be known as the garment area of New York?—A. Oh, yes.

The COURT. I do not understand what that area is.

Q. Will you describe the area?

The COURT. About how far does it go east and west?

A. I would say it extended from 40th Street and Eighth Avenue across to Sixth, and down to about 23rd Street, and then across again to Eighth.

Q. How much of an occupancy did that area have, of firms in the dress business or connected therewith?—A. I do not understand that question.

Q. Was the area solidly occupied by dress firms?—A. Oh, no; there were quite a few different industries in that neighborhood, but the garment industry almost wholly occupied the—all the garment industries were in that neighborhood, but that entire neighborhood was not the garment industry.

Q. Has the National Garment Company always been in loft buildings in its business life?—A. Yes.

Q. What business is the National Garment in, Mr. Sternschuss?—A. Manufacturers of dresses.

Q. Will you describe the manner in which you manufacture dresses to the Court, Mr. Sternschuss? Not in too much detail, please.—A. We buy the raw materials——.

Q. Where do you buy the raw materials?—A. Well, from piecegoods houses, trimming houses, and accessory houses.

Q. Where do the raw materials come from?—A. Well, in their original state I guess they come from all parts of the country.

Q. What do you mean by their original state?—A. Well, the original state of a piece of goods may come from a cotton mill down South.

Q. Does that have any description in the trade?—A. It would be called a cotton fabric.

Q. Is any other term applied to it? If I may lead for a moment, your Honor, isn't it called grey goods?—A. Yes; in the original raw goods state it is grey goods.

Q. Where is that made generally?—A. Wherever the mill happened to be located. In all parts of the country; any part of the country.

Q. The raw materials that you get, do you know where the grey goods that went into the process come from?—A. We know generally. I would not say I know the exact state, but we know some of the names of the mills.

The COURT. You do not manufacture only cotton goods?

The WITNESS. No, we have all kinds.

The COURT. Rayon and others.

The WITNESS. Most of them are synthetic.

Q. Will you indicate where the goods are made into grey goods?—A. The goods are made into grey goods at Richmond.

Q. That is, the yarns are made into grey goods?—A. Yes. Richmond, North Carolina, I believe. I believe there is a Richmond in North Carolina.

The COURT. There is a Richmond there?

The WITNESS. I think so. I may be wrong about that. Anyway it is down South. Then there are mills manufacture goods in New England, in New Jersey.

Q. Now we have the grey goods. What happens to the grey goods thereafter?—A. It may be sent to a dyeing and finishing plant for further processing, or it may be processed in the same plant where it is manufactured into grey goods.

Q. Is there any particular spot in the country that is known as a concentration point for dyeing?—A. Yes; New Jersey.

Q. Are these piecegoods manufacturers, then, located in New Jersey?—A. No; their offices are in New York. That is only their finishing plants. They may not even own that plant, it may be a privately owned plant.

Q. They buy the grey goods, do they, and ship them to New Jersey or other places to have them finished and dyed?—A. Yes.

Q. How do the finished goods come into your place of business?—A. It comes in by motor truck from the State that produced it—finished it at least—into the—there are various methods. It may be shipped directly to us or may be shipped

from the piecegoods firm from whom we bought it, and then they in turn reship it to us.

Q. How are they actually brought to your place?—A. They are usually sent in on small trucks that are pushed along the street, brought into the building and brought into our premises.

Q. Taken up on the freight elevators to your premises?—A. Yes, sir.

Q. Where do you accept delivery, at what point?—A. In our piecegoods room.

Q. And what happens to the piecegoods?—A. After the checking off it is recharged to one of our contractors, and then their truckmen pick it up, usually late in the evening, late in the day, and take it to the several contracting places where it is processed into dresses.

Q. Where does that truckman pick up the piecegoods?—A. In our piecegoods department.

Q. On your floor in your premises?—A. Yes, sir.

The COURT. Where are these people that sold the goods to you?

Mr. ROZEN. The contractors.

The COURT. Yes. Are they in New York State?

The WITNESS. All with the exception of one.

The COURT. And where is that one?

The WITNESS. That is in New Jersey.

Q. What is the appearance of the piecegoods when it comes into your place of business, Mr. Steruschuss?—A. It is usually rolled on tubes.

Q. About how bulky is a tube?—A. The tube or the complete piece of goods?

Q. With the piecegoods rolled on it?—A. Well, it varies with the quality of the goods, but it is about some 40 odd inches long and I would say it is about 6 to 8 inches high.

Q. How much would you say it weighed?—A. It depends on the fabric.

Q. Could you give us the range?—A. I would say it could weigh from five pounds to 45 pounds.

The COURT. You say 6 to 8 inches. Do you mean 6 to 8 inches thick, this roll? I suppose it looks like a cylinder.

Q. In diameter do you mean?—A. In diameter it would be about 8 inches.

Q. About how many tubes of finished goods do you believe are shipped into your place a day?—A. A day? The average you mean?

Q. Yes.—A. During the period of a year.

Q. I would like you to separate it between the slow periods and the good periods. If you can you may do so?—A. It is hard to say. The way we do business now about 40,000 pieces.

The COURT. A day?

The WITNESS. No; 40,000 a year average.

Q. What is the size of the shipments that come in? I mean do you get two tubes, ten tubes; how many at a time?—A. That also varies. We get anywhere from one tube to a thousand tubes, a thousand pieces of goods.

The COURT. Are these all cotton prints, as they are called?

The WITNESS. No; they are all types of fabrics. Most of them are rayon fabrics—acetate rayon.

The COURT. There are prints, too?

The WITNESS. Yes; prints and plain goods.

The COURT. Printed in solid colors?

The WITNESS. Yes; solid colors.

Q. After you receive the piecegoods is there any further process you subject them to in your place?—A. The only thing we do with the goods is to make samples.

Q. Do you send the goods out to any contractor for any further processing?—A. Yes.

Q. I do not mean manufacturing or sewing, I mean printing, as the judge has just asked.—A. We do once in a while.

Q. What is that?—A. The only process we would send the goods out for would be for a Velveray process. It is painting on goods.

Q. Is that the sort of process where they make dots on solid cloth?—A. Yes; that is it.

Q. Where are the Velveray people located?—A. Some in New York City.

Q. Where do you send your goods for that process?—A. It all depends on the firm makes the process. There are several of them. Some are in Massachusetts, some are in New York City, some in Brooklyn.

Q. Where do you send your goods?—A. We usually send it to the piecegoods house that reships it in order to process it for us.

Q. Do you know where they are shipped by the piecegoods house?—A. If the work happens to be done by the Velveray Corporation of America it would go to their plant, which I believe is in Massachusetts.

Q. You said you had one contractor in New Jersey?—A. Yes.

Q. Could you give us an estimate of about how much of your work is done with him?—A. Yes; I have the figure here. Can I look at it?

The COURT. Surely.

Q. Yes.—A. About $50,000.

Q. That is a year?—A. That is in labor.

The COURT. That does not mean anything to me. What proportion is sent to this New Jersey man?

Q. Could you answer that question, Mr. Sternschuss?

The COURT. Roughly speaking, what proportion?

The WITNESS. What proportion? He would get about 8 percent of our dresses.

The COURT. Is he engaged in what is called reprocessing the piece goods, or is he engaged in the sewing of the piece goods after they have been cut out?

The WITNESS. Well, he does the cutting also.

The COURT. He does that cutting, too?

The WITNESS. Yes.

The COURT. I thought you did the cutting.

The WITNESS. No, we do not do the cutting, only for the samples made on the premises.

The COURT. What do you do?

The WITNESS. We just supply the raw goods, and the trimmings that go with the dresses, and naturally the patterns and ——

The COURT. The style and all that sort of thing?

The WITNESS. The styling.

The COURT. I understand that, but you do not do any manufacturing of piece goods on your own premises?

The WITNESS. No, sir.

Q. You manufacture samples, do you?—A. Yes.

The COURT. I meant no manufacturing except samples.

Q. And these samples are sent to the contractor, are they, with the piece goods?—A. Well, it is sent to the contractor, not always with the goods.

Q. Yes; so that the contractor may see the kind of dress that you want to have made?—A. He has to have a sample with which to work.

Q. How much equipment do you have in your place for the manufacture of the samples?—A. We have what is known as cutting tables, several sewing machines, and the things that are incidental to finishing.

Q. Pressing machines?—A. Press boards and the pinking machines.

The COURT. Pinking?

The WITNESS. Pinking.

Q. Will you describe that operation to his Honor?

The COURT. Oh, no.

A. That takes a zigzag line in a seam and makes it look clean.

Mr. ROZEN. And keeps it from ravelling.

The COURT. I have had a great many patents in the needle trades, so to speak, and I think I have heard about most of these things.

Q. Then the finished dresses are made up by the contractors, are they?—A. Yes.

Q. And what happens to the dresses from that point?—A. Then they are shipped from the contractor by his truckmen to us.

Q. At what point do you accept delivery of the finished dresses?—A. In our receiving department.

Q. On your floor?—A. On our floor.

Q. And then what happens with the dresses?—A. Then they are examined, picked out for orders, and shipped to customers.

Q. Are all sales made from the floor?—A. No; most of the business is booked in advance.

Q. Will you describe that operation of booking it in advance?—A. Well, our salesmen either go out and call on the customers and take orders for future delivery or customers may come into our showroom and buy from the samples for future delivery.

Q. And how do you ship your dresses? What means of transportation do you employ?—A. Well, we use several means. We ship some goods by parcel post, Railway Express Agency, or by our truckmen to a New York receiving office, or by special carriers that are designated by the customers who bought the dresses.

Q. Does the Railway Express Agency pick up the stuff for shipment at your premises?—A. Yes.

Q. And what does it do with it?—A. Takes it out to the chute in the freight hall.

Q. And the truckers, where do they pick up the dresses?—A. You mean the special truck carriers?

Q. Yes.—A. They pick up the packages in our shipping department and take them out to the freight hall.

Q. How do the dresses go out, in what form, in boxes or racks —— A. In several forms; in boxes and on racks.

Q. I meant to ask you, Mr. Sternschuss, when the goods come back from the contractors, in what form do they come back?—A. On racks.

Q. They come up the freight elevators, of course?—A. Yes, sir.

Q. About how many dresses do you think you manufacture a year?

Mr. MERRITT. You mean samples? He says he does not manufacture them.

Mr. ROZEN. It is all according to how you describe it.

Mr. MERRITT. If you are going into the volume of business it is already covered, and our agreement is——

Mr. ROZEN. No, I am not going into the dollar volume of business.

The COURT. I do not see what you want to develop. In that Exhibit 25 we have all the information that we really need, haven't we?

Mr. ROZEN. I wanted to show your Honor, if I might, the number of dresses manufactured by this firm and the number of dresses they ship out, and I wanted to develop how they are shipped, and the number of dresses shipped per shipment, or per customer, if we could get such figures, so that your Honor could get a full idea and full picture of the way these people depend upon the building facilities in the running of their business. What I am afraid of, your Honor, in presenting this case, as your Honor said the other day, is that there may be a lacunae in the case. It will be a lopsided picture. We have shown how the employees work, but we have not shown you how the manufacturers and the tenants work. In order that there may be no gaps of any kind, I would like to complete the other half of that picture.

The COURT. You don't have to go into the number of dresses that are manufactured for that. You have all you need in that exhibit.

Mr. ROZEN. It does not quite complete the picture, your Honor. It might be, perhaps, that these people could have their dresses sold, figuratively, let us say, in one month, and the other eleven months they might not be shipping a dress. There is nothing in these figures to show how frequently they ship them.

The COURT. How frequently do you ship?

The WITNESS. Every day.

The COURT. That settles that.

Q. Is it shipped every day outside of the state?—A. In my business, yes.

Q. And do you get incoming stuff, raw materials, every day from outside the state?—A. Yes; every day but Saturday and Sundays.

Q. But on Saturday stuff goes out, does it, finished goods, outside of the state?—A. Yes.

By the COURT:

Q. And so far as the place at which they leave your custody and go into some other person's custody, say the parcels post, do they come up and pick up the parcels post deliveries at your office?—A. No; we have to deliver that to the post office.

Q. And the express company people come up and take it and send the parcels down the chute, do they?—A. Yes.

Q. We know about the chute already. We have heard all about that. And if you have shipments that are going in some other way, by freight or motor vehicle or what not, then where do they get them? Where does the truckman take them from?—A. Well, there are times when we have to deliver them ourselves. That is usually when it is done after working hours, but during the day they come to our premises and pick them up.

Q. Give receipts and go away?—A. Yes. There are some occasions when we deliver them to them during the day, too, if there is a special rush.

Q. But the regular course of business is that way?—A. Yes.

Q. In other words, with the exception of the parcel post, somebody comes and picks them up from your door, we will say, and that covers the whole thing. That is all there is to it?—A. Yes.

Mr. ROZEN. Just a few important points, if I may touch on them. I will yield to your Honor's suggestion about not going into the number of dresses manufactured.

The COURT. Oh, well, you will have to.

Mr. ROZEN. I mean I do it graciously, your Honor.

By Mr. ROZEN:

Q. Do returns come to your place of business, Mr. Sternschuss?—A. Some are sent back by the post office and some by Railway Express and some we pick up ourselves, and some the customers send to us themselves.

Q. But those that are transported to your premises by the Railway Express or parcel post, at what point do you accept delivery?—A. On our premises.

Q. Do you get water from the building for your manufacturing purposes?

Mr. ROZEN. Or perhaps you object to the word "manufacturing," Mr. Merritt.

Mr. MERRITT. I do. He manufactures samples.

Mr. ROZEN. Not only manufacturing samples, your Honor, but in the trade I believe Mr. Sternschuss's firm is known as a manufacturer because they get the piece goods and——

The COURT. I suppose they are called manufacturers, yes. They really are kind of entrepreneurs, middlemen.

Mr. MERRITT. I don't think Mr. Rozen is correct. I have had occasion to examine the various labor agreements entered into between the contractors and manufacturers, and between the contractors and the unions, and there are manufacturers and there are people who are jobbers, like this particular concern.

The COURT. That is what I say; entrepreneurs.

Mr. ROZEN. Let us ask Mr. Sternschuss. He is the expert.

Mr. MERRITT. I don't care about the terminology, but I don't want anybody misled by confusion of words. That is all I mean.

Mr. ROZEN. I suggested that you might object to "manufacturing."

By the COURT:

Q. What is your status? What is your kind of business called?—A. We are considered manufacturers of dresses.

Mr. ROZEN. Then may I use the word "manufacturing" with respect to this witness, your Honor?

The COURT. I suppose you can. He says they are considered manufacturers and I suppose he ought to know. How much more do you want to ask him?

Mr. ROZEN. Just a few more questions, your Honor, if I may?

By Mr. ROZEN:

Q. Do you get water from the building?—A. I believe we do.

Q. And for what purpose is it used?—A. Well, outside of the ordinary purposes, for drinking it and using it for toilet facilities, we use it to create steam for a boiler we have on the premises.

The COURT. What do you do with the boiler, press your samples?

The WITNESS. We re-press dresses and sometimes press samples.

Q. Is that a necessary part of your business?—A. Well, we consider it to be.

Q. Does the building provide heat and light and elevator service, too?—A. Yes, sir.

The COURT. The lease must show those things.

Mr. ROZEN. The lease, of course, provides for those things but there is a question whether or not the terms of the lease have been carried out. For example, I am about to ask a

question with regard to this clause in the lease, "The landlord agrees at its own cost and expense to paint all walls and kalsomine the ceiling of the private office, showroom and general lobby of the herein demised premises." The lease provides for it but do you think I could rest on that without asking whether it is done?

Mr. MERRITT. I had supposed it was established, and if it is not I concede it, that under the normal arrangements here existing between the building and the tenant, we supply heat for the radiators and light is supplied through a sub-metering company.

The COURT. Of course those things take care of themselves. If people do not live up to their contract the lessee is very apt to get into a fuss or leave or something of that kind.

How long have you been in this building?

The WITNESS. I think about four or five years.

The COURT. An annual lease each time?

The WITNESS. I believe the first lease was for three years and then two one-year renewals.

The COURT. That simply means they must have lived up to the agreement or else waived it or something of that kind. I don't think we need to go into all of that.

Mr. ROZEN. You don't think I have to ask him whether or not this work was done?

The COURT. I would just as leave if you do it, but I don't think it is necessary. But go on if it will satisfy you. Go on and ask him.

By Mr. ROZEN:

Q. Was this work done, Mr. Sternschuss?—A. Will you say that over again?

Q. In your lease dated February 1940, it is provided, "The landlord agrees at its own cost and expense to paint all walls and kalsomine the ceilings of the private office, showroom and general lobby of the herein demised premises." Was that work done?—A. Yes; it was.

Q. By the building?—A. Yes.

Q. Is the package chute in the building of any assistance to you in your business?—A. Why, yes.

Q. Will you describe it, please, and indicate, if you will, the degree to which you depend upon it to assist you, if it does?—A. Well, it certainly expedites matters to have the packages go down the chute right on our premises instead of having to take them downstairs on the street like some other firms may have to.

Q. Has there been a change recently in the time of delivery of dresses from a jobber or manufacturer or wholesaler to a retailer?—A. Been a change?

Q. In time of delivery.

Mr. MERRITT. You mean by his company?

Mr. ROZEN. No; I mean generally in the industry.—A. You mean in reference to what time? In reference to what?

Q. What I have reference to, if I may lead for a moment, is that at one time dresses were ordered from manufacturers with regard to style; you would order a certain number of dresses, just certain colors, perhaps, and you would take those dresses and ship them and it might take a couple of weeks or more for shipment, is that true?—A. Yes; that is true.

Q. Is there now a change in the way business is done as to the speed with which the retailer expects his merchandise shipped?—A. Yes, sir.

Q. Will you describe that for us, if you can?—A. I would say about ten years ago dresses would be considered as being received pretty fast if they were delivered in a month or six weeks. Today if you cannot get them in one week it is not considered very good delivery.

Q. So anything that speeds up delivery is important to the business?—A. Oh, yes; I should say so.

Q. Were you there during a strike of the maintenance employees?—A. Yes; I was.

Q. Will you describe the condition of the building during the strike, please, if you know?—A. We could not get up onto the floor unless we walked up. We are on the eighth floor. I mean all the elevators were stopped running and in order to get to our premises we had to walk up.

Q. Was there much walking done?—A. Well, not by myself, but there was by other people in the business.

Q. Were you able to ship goods?—A. No; we were not.

Q. Was the place heated?—A. Not very well.

Q. Was there any porter service during the strike?—A. You mean by the building?

Q. Yes.—A. No.

Q. Has the building ever done any work for you except at the time of the making of a lease or renewal of a lease?—A. I do not recall of them ever having done any.

Q. Do you recall that a large office was made in your place?—A. Yes.

Q. What was the condition about that time?—A. Well, the space was occupied by two offices. It was made into one large office.

Q. Who did that?—A. The building.

Q. At what time was that done?—A. That was done at the renewal of our last lease.

Q. At the renewal of the lease?—A. Or a short time before.

Q. It is important, if you can recall.—A. I believe it was done because of our renewing the lease.

Q. You are on the 8th floor, Mr. Sternschuss?—A. Yes.

Q. Could piecegoods be delivered to you——

Mr. MERRITT. I object to the "Could piecegoods be delivered to you."

Mr. ROZEN. If you will let me finish my question perhaps your objection might be more valid.

The COURT. All right, finish your question.

Q. Could piecegoods be delivered to you, Mr. Sternschuss, if the elevator stopped running?

Mr. MERRITT. Well, now——

The COURT. That is merely absurd. Of course people could carry things upstairs, but they would have a hard time doing it and you would have a local objection to it, but all you have to do is to see people in these apartment houses where they have not facilities, carrying things upstairs and moving them. It can be done but it is not the way things are done now. That is all there is to that.

Mr. MERRITT. The ground has been covered by leading questions to which I made no objection whatsoever.

The COURT. I don't see anything in it at all. I think we have gotten all we possibly could want, and I have been very indulgent about all these things. I do not see any sense in going on forever with it, though. Almost anything can be done, but some things would be so inconvenient to do that you could not get anybody to do them.

Mr. ROZEN. I just wanted to establish beyond any possibility of speculation, looking at a cold record, that it not only is inconvenient but it cannot be done as a matter of general operation of business. If the defendant will concede that perhaps we can eliminate further questioning on that.

The COURT. Nobody would concede it could not be done.

Mr. ROZEN. But I mean they could not operate their business up there in that way.

The COURT. If they did not have elevators they would not have any high buildings. That is the answer to that. I am willing to take judicial notice of that and I think the appellate court would have the same idea.

Mr. ROZEN. I am sure of that.

The COURT. Then let us not waste any more time on that.

Mr. ROZEN. I have no further questions. You may inquire, Mr. Merritt.

Cross-examination by Mr. MERRITT:

Q. When you purchase your piecegoods do you usually place the order with some concern in New York City?—A. Yes; usually.

Mr. MERRITT. That is all.

By the COURT:

Q. They have commission houses all up and down Fourth Avenue, haven't they?—A. Yes.

Q. And their places in that general district deal in accepting orders?—A. Well, those commission houses, I believe, are what are commonly known as factors. They check your credit, but they don't take the orders.

Q. How are the orders given?—A. The orders are usually given by us to an individual piecegoods house which may have its credits checked through one of those factors.

Q. You have not any place you can go and look at the piecegoods?—A. Oh, yes.

Q. Where do you go for that?—A. Well, the firm may send a salesman up to our premises and we might buy the goods from the sample.

Q. Yes, but haven't they got local offices?—A. Yes.

Q. Now take the people I know, for instance Cheney Brothers. I used to go to college with a lot of the Cheneys, from South Manchester. They have—I don't know what you call him, an agent or factor or house or something—but one of the brothers used to come down and have charge of it?—A. Yes; that is right.

Q. What do you call those people?—A. Those are silk manufacturers.

Q. I know they are silk manufacturers, but what kind of a person would you call the man that represents them?—A. A salesman. You mean the man who——

Q. The man who runs their business is not called a salesman?—A. No.

Q. What sort of office do you call that?—A. We would call it the showroom of the silk manufacturing company; the showroom and office.

Q. They have that kind of showroom all over New York, haven't they?—A. Yes, sir.

Q. And you can go out and look at the piecegoods there if you want to?—A. Yes, your Honor.

The COURT. That is all.

The COURT. How many more witnesses have you got?

Mr. ROZEN. We have a few more tenants who are engaged in the manufacturing of dresses, but do it in a slightly different way than this tenant has described and I think it is important so there again may be no lacunae in the picture. Then we have some witnesses who will give your Honor some general statistics as to the dress industry and trucking industry and a general picture of the background for this particular case—economic data——.

The COURT. Economic data?

Mr. ROZEN. Yes; I mean the general trend of the business.

The COURT. I cannot deal with it until we get to the witnesses, because I am not a prophet, but I should think it would be very dubious kind of stuff. However, when it comes along I will deal with it.

(Short recess.)

SYLVIA EICHNER, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. ROZEN:

Q. Where do you reside, Miss Baum?—A. 25 Elliott Place.

Q. Did you give your name to the stenographer as "Eichner"?—A. That is right.

Q. Is that your marriage name?—A. Yes, sir. Baumrind is my maiden name. I am just called "Baum" at the office.

Q. Where are you employed, Miss Baum?—A. At 463 Seventh Avenue.

Q. By what firm?—A. Max Schneck & Bros., Inc.

Q. Is Mr. Schneck one of the owners of that business?—A. Yes.

Q. And a stockholder?—A. Yes.

Q. What office has he?—A. I believe he is the president, but I am not sure.

Mr. ROZEN. I call upon the counsel for the defendants to concede that the officers and directors of the Arsenal Building Corporation are: Max Schneck, president; Miss Jackson, vice-president; Leon R. Spear, secretary, and Aaron Rabinowitz, treasurer.

Mr. MERRITT. That is conceded.

Mr. ROZEN. That the capital stock of the Arsenal Building Corporation is owned 50 percent by Max Schneck and 50 percent by Spear Securities Company.

Mr. MERRITT. I object to it as incompetent, irrelevant, and immaterial.

Mr. ROZEN. Is it the fact?

The COURT. He is objecting to it, so you will have to prove it.

Mr. ROZEN. Yes, your Honor.

The COURT. You will have to prove it in some other way.

Mr. ROZEN. This was furnished to me by Mr. Clifton.

Mr. MERRITT. I do not object to it as not properly proved, but I object to its admissibility, as irrelevant.

The COURT. Give me the names of those people.

Mr. ROZEN. I have them down here on a sheet of paper, your Honor.

The COURT. Then give them to me.

Mr. ROZEN. That was typewritten in Mr. Merritt's office [handing paper to Court].

The COURT. You want an admission that is on here—that the capital stock is owned 50 percent by Max Schneck and 50 percent by Spear Securities Company.

Mr. ROZEN. Yes, your Honor.

The COURT. Is Spear Securities Company the same as Spear & Company, or is that something different?

Mr. LEON R. SPEAR. No connection at all.

Mr. ROZEN. It is a separate corporation?

Mr. LEON R. SPEAR. Entirely. Absolutely no connection in any way.

The COURT. I cannot see what it has to do with this matter. It is just an attempt to throw a little dirt in, I think, and I will sustain Mr. Merritt's objection.

Mr. ROZEN. Your Honor, of course the phrase "a little dirt," I am not sure what your Honor means by that.

The COURT. I mean just what I said. It is just an attempt to put in something that befogs the issues. It has nothing to do with the issues we are trying here and is just an attempt to tie up this thing in some other way.

Mr. ROZEN. Your Honor, I assure you that we are not trying to becloud the issues at all, and the purpose of offering it was to show to your Honor that Max Schneck, one of the important tenants in this building, is also a stockholder of the owning corporation. Now technically and legally, of course, I suppose they are separate entities, but looking at the broad picture of the thing, and particularly in view of the defendants' contention that the test of coverage of the Fair Labor Standards Act is based on what the employer does, I wanted to show that in this case even under their contention there might be some partial piercing of the corporate veil, at least to the extent of holding that the employees were covered. Max Schneck being an important tenant and being a stockholder and officer of the owning corporation, he approaches to some extent the relationship whereby the contention of the defendants that

coverage depends upon what the employer does could possibly be met,

The COURT. I will settle that right now. Mr. Justice Holmes in his extremely celebrated remarks in the case of Donnell v. Herring-Hall, 208 U. S. 267, spoke of a corporation being a non-conductor. So I shall consider that the corporation is a non-conductor here. Then it does not make any difference about this at all. We have got to stick to the concept of producing for interstate commerce. That is the principal concept here. Not actual interstate commerce but production for interstate commerce. Isn't that the statute provision?

Mr. REYMAN. That is correct, your Honor.

The COURT. We have to get that concept in our minds and fix it there and not have our minds bothered on that score. When you have it fixed in your minds then you decide whether the employees, and if so which type of employees, of the Arsenal Building come within the description of being engaged in production for interstate commerce. I think that is exactly the right approach to it.

There must be some limit. This statute does not just flow around like a flood, or anything like it; there are certain limits. Mr. Justice Stone has said what the limits were in those cases he had before him.

This case is rather new and I understand perhaps novel, though you say you had a case in Philadelphia. If it was not a fact that we were a federated government instead of a unitary government such as the Government of Great Britain, for example, there would be a different situation facing us. When you have a federated government there is necessarily a margin or boundary between the federated and unitary government, and in the powers granted to the federated government there is an approximation at least of the competence and power of the unitary government. But there must be a twilight or boundary zone existing, and it is often difficult to decide where to draw the line.

I have got to decide, as I see it, with respect to the different employees. I have to look at them as granulated, if you want to put it that way. Each of them is a separate employee and you decide whether he is engaged in interstate commerce. It probably depends on the job of each employee.

I am not deciding the case, but that is the way I look at it as I understand the decisions. It depends on the sort of job each employee is involved in whether he can be considered engaged in the production of goods for commerce. We have to see how far beyond the actual operatives who were engaged in making them, or confessedly doing that sort of thing, you

can stretch the boundary of the statute. I think that is a fair statement?

I have been thinking a great deal about the approach you should make to this, and I certainly do not think it makes the slightest difference in the world who owns the Arsenal Building Corporation or who the stockholders of the Arsenal Building Corporation are. I do not think it makes any difference. That is my own opinion, that it does not make the slightest difference at all. I do not know what some other court may think about it.

I am going to sustain the objection to that part anyhow. I do not think it is going to affect the matter in any way whatever, as far as I am concerned.

Q. What business is Max Schneck & Bros., Inc., engaged in, Miss Baum?—A. Manufacturer of dresses.

Q. What floors do they occupy? In the building.—A. 11th floor and part of the 12th floor.

Q. Do you have the lease with you?—A. No; I have not.

Mr. ROZEN. May I ask for a copy of the lease, Mr. Clifton, please?

Mr. MERRITT. I understand there is one. There is a lease of the 11th floor, but none of the 12th yet. We will give you the lease for the 11th.

Mr. ROZEN. There was a lease for the 11th and 12th, wasn't there?

Mr. MERRITT. I believe so. There has been testimony to that effect.

The COURT. Yes; we have had that.

Mr. ROZEN. I recall it. You only gave part of the 12th; is that right?

The COURT. Half of the 12th.

Mr. ROZEN. Yes, your Honor.

Q. While the lease is being obtained, Miss Baum—I insist on calling you Miss Baum, because that is the name I have been given—A. That is all right.

Q. Mrs. Eichner. Do you have any rent bills with you?—A. Yes; I have.

The COURT. Have you other kinds of bills besides rent bills?

Mr. ROZEN. Yes, your Honor.

The WITNESS. Do I have to give these up?

The COURT. They will make photostat copies of them.

Mr. ROZEN. Do you desire them to be marked for identification as one? There are six of them here.

The COURT. I think you might mark them all for identification as one.

(Marked "Plaintiff's Exhibit No. 28" for identification.)

Mr. MERRITT. May I see them?

Mr. ROZEN. Before I offer them in evidence shall I show them to you, Mr. Merritt?

Mr. MERRITT. Before you offer them in evidence.

Mr. ROZEN. I thought I might show them to you after I offer them, but before is all right [handing to Mr. Merritt]. Do you have any objection to them?

Mr. MERRITT. No objection.

Q. I show you Plaintiff's Exhibit 28 for identification, consisting of six rent bills marked "Paid," for the months of March 1941, February 1941, January 1941, December 1940, November 1940, and October 1940 [handing to witness], and ask you whether these are the rent bills delivered to you by Spear & Company and paid for by your firm?—A. Yes.

Mr. ROZEN. I offer them in evidence, your Honor.

Mr. MERRITT. No objection.

(Plaintiff's Exhibit 28 for identification received in evidence.)

Q. Does the building sub-meter electricity to the tenants?—A. Yes, sir.

Q. You have some electric bills?—A. Yes, sir.

Mr. ROZEN. I presume we can have these marked for identification as one exhibit also, your Honor.

The COURT. Yes.

(Marked Plaintiff's Exhibit 29 for identification.)

Mr. ROZEN. Do you want to look at these, Mr. Merritt? [Hands papers to Mr. Merritt.]

The COURT. I just wanted to tell you that your citation of the Killingbeck case is wrong. That is why I was so long this morning.

Mr. ROZEN. I am awfully sorry, your Honor.

The COURT. It should be 259 Appellate Division 691. It is not there at all, in the citation you give here. 259 Appellate Division 691. It is in your brief.

Mr. CLIFTON. That is in our brief, and I understand it is correct, your Honor.

The COURT. There was some mistake. In that New York Supplement citation you had it wrong. I looked twice in the Circuit Court of Appeals library and I could not get it straightened out.

Q. I show you Plaintiff's Exhibit 29 for identification, consisting of six electric service bills made out to your firm by Spear & Company, Inc., and marked "Paid." I ask you if those are the bills which you paid for electricity to Spear & Company [handing to witness]?—A. Yes, sir.

Mr. ROZEN. I offer them in evidence, your Honor.

Mr. MERRITT. No objection.

(Plaintiff's Exhibit 29 for identification received in evidence.)

Q. Miss Baum, do you manufacture the entire dress in your firm's quarters at 463 Seventh Avenue?—A. Well, I guess we can say yes.

Q. What about special operations such as embroidery?—A. Well, embroidery goes out; pleating is sent out sometimes.

Q. Shirring?—A. No; that is done on our own premises.

Q. Stitching?—A. What do you mean by stitching?

Q. You explain what you mean by stitching.—A. I do not understand what you mean by stitching. In what way, stitching what?

Q. Stitching dresses into special designs.—A. We make the complete garment.

Q. I understood there was a special operation called "stitching," that was sent out to contractors, but I may be wrong.—A. No.

Q. All right. Where are these contractors located?—A. We do not have contractors.

Q. That do these special operations such as embroidery.—A. In the City of New York.

Q. Do they call for the materials at your place of business?—A. Yes.

Q. On your floor?—A. Yes.

Q. Do they deliver them back again?—A. That is right.

Q. To your floor?—A. Yes, sir.

Q. They use the elevators, do they, for that purpose?—A. Yes, sir.

Q. How many machines do you have in your place of business?

The COURT. What kind of machines, sewing machines?

Q. Do you have any sewing machines in your place of business?—A. Yes.

Q. How many sewing machines?—A. We have over 200, I believe.

Q. Do you have any pressing machines?—A. Yes, we have pressing machines.

Q. How many pressing machines?—A. They are not called machines. They are called steam irons.

Q. How many steam irons do you have?—A. About 30.

Q. You get the power for the sewing machines from where?—A. It is electric power.

Q. From the building?—A. Well, it is the same electricity we use for everything else.

Q. How do you get the steam for the steam irons?—A. That is our gas. It is run by gas. It is a boiler run by gas.

Q. There is a boiler in your premises?—A. Yes, we have a boiler in our premises.

Q. Will you describe how the steam is piped to each operator?—A. Well, there is a boiler and connections are made from the boiler. I don't know just how. What do you mean, just how they are piped?

Q. Is there a central boiler on the floor?—A. Yes, we have two boilers.

Q. There is gas which heats it and makes steam?—A. Yes.

Mr. ROZEN. I am leading the witness, Mr. Merritt. I hope you do not object.

Mr. MERRITT. I will try not to object.

Mr. ROZEN. It is so hard to get these things any other way, your Honor. I want to cut down, if I can.

The COURT. What do you call those, steam pressing machines?

The WITNESS. Steam irons.

Q. There are pipes running from the——A. From the boiler across the ceiling, and every steam line is connected with the pipe, to the pipeline on the ceiling.

Q. What connection is there between the ceiling and the steam irons?—A. It is a pipe that comes down.

Q. Is it flexible or rigid?—A. It is flexible from a certain part down.

The COURT. You would have to have it flexible if you were going to iron.

Mr. ROZEN. Yes, I know these facts, your Honor, but I am trying to bring that out so your Honor will have a picture of how these plants operate. Perhaps I am giving you too much detail.

The COURT. You must give the Court some credit for rudimentary common sense.

Mr. ROZEN. It is no discredit, on my part, your Honor.

Q. Do you have a chute there or other means of getting material from the 12th floor to the 11th floor?—A. We have one chute that we throw finished garments down.

The COURT. You mean just in your own premises, intramural, so to speak.

The WITNESS. In our own premises. We throw the finished dresses down in the chute.

The COURT. And it goes down to the next floor below?

The WITNESS. That is right.

Q. Is there a dumb-waiter elevator in your place?—A. Inside our place?

Q. Yes.—A. No.

Q. Has one been constructed recently?—A. No, sir.

Q. Do you get raw materials daily, or how frequently?—A. Every day I should say.

Q. From outside the state?—A. Some.

Mr. MERRITT. I object to the leading.

The COURT. Yes.

Q. Where do you get these raw materials?

The COURT. We have already agreed that they do an enormous business which is called interstate business. I don't see what good it does to go on like this. Suppose everybody, in a chorus, were put on and sworn to say these things. It does not add anything. This is not a precise analogy, but I never heard of a court sitting and trying a case after a man pleaded guilty. If a party has made a concession that covers a point, why should we have evidence?

Mr. ROZEN. I don't think we should, and my theory is we are not doing that. Of course I may be wrong, but what I am trying to show is the extent of commerce and how seriously the place would be affected by stoppage of these maintenance facilities, and the degree upon which they rely upon it and the degree in which the elevator people and porters and firemen are all related to this business which is a separate business, manufacturing business, in a loft building. I am not trying to cover something that has been admitted. I hope I am not.

The COURT. I thought you were just then in that question. Go on and see if we cannot finish with Miss Baum before luncheon.

Mr. ROZEN. I am sure I will be able to do that, your Honor.

Q. How frequently do you ship out of the state?—A. Every day I should say.

Q. To what point are incoming shipments of raw material made?—A. To our receiving rooms.

Q. And from what point do materials and goods go out?—A. From the shipping department.

Q. In your premises?—A. That is right.

Q. What methods of shipment do you employ?—A. Well, we ship by boxes and we ship on racks.

The COURT. No; he means what carriers.

The WITNESS. We have truckmen, Railway Express, and we send packages by parcel post.

Q. Were you there during the strike?—A. Yes.

Q. Will you describe the effects of the strike upon your——

Mr. MERRITT. I object to this as cumulative.

The COURT. Yes. We have that whole thing in already, haven't we? It is so ridiculous for us to sit and listen to this all over again. If a person has described what effect it had on the eighth floor, surely a person on the eleventh floor would be so much more affected.

Mr. ROZEN. If counsel for the defendant will concede all businesses were similarly affected, maybe we can abandon this line.

The COURT. I cannot see the slightest reason for your going over and over this same subject.

Mr. ROZEN. The reason for it is this, your Honor: in the examination of the employees Mr. Merritt very triumphantly brought out a couple of times that some were out on the sidewalk and did not know what was going on inside; that they were not there.

Mr. MERRITT. Please do not characterize my testimony.

The COURT. Don't say "triumphantly."

Mr. ROZEN. I withdraw that adjective or adverb or whatever it may be. But I am trying to show what happened inside the building.

The COURT. But we have already been told there was not any work going on.

Mr. ROZEN. Very good, your Honor. I think that is all for this witness. You may inquire, Mr. Merritt.

Cross-examination by Mr. MERRITT:

Q. Isn't it a fact that you purchased the gas which you use for your steam irons directly from the Consolidated Edison Company?—A. That is right.

Q. Are you familiar with the way in which you purchase piecegoods?—A. In a way.

Q. Isn't it a fact that those piecegoods are purchased predominantly from people in New York City?—A. That is right.

Q. They sometimes come to you with samples and your concern places large orders for goods covered by that sample?—A. That is right.

Q. Some of those goods are carried in stock in concerns in New York City, are they not?—A. Yes.

Q. Some of them are made in New York City?—A. It is possible. I do not know.

Q. And it is a fact that you purchase the finished piecegoods as a general proposition, is it not?—A. Yes.

Mr. MERRITT. That is all.

By the COURT:

Q. You mean that you purchase them from people who own them in New York or people who are just agents for the other people in New York?—A. Well, I believe they own them.

Q. And then you go and buy them from people who are here in New York City. You do not buy all your goods that way?—A. No, we do not buy all our goods that way.

Q. You buy a great many goods outside of New York?—A. No, I believe all our orders are placed with certain people.

Q. Then of course you do not know what status they have to the owners of the goods, do you?—A. Well, as I understand it, the people we buy the goods from own the goods.

Mr. ROZEN. Do you know about that, Mrs. Eichner?

The WITNESS. I believe that is right; that if we purchase goods from a piecegoods house they own the goods before they can sell them to us.

Mr. ROZEN. You mean they have title to them.

The WITNESS. I don't know what you mean by that.

Mr. ROZEN. I think we can develop that better by some other witness, your Honor, who is actually in that business.

The COURT. I don't think you need to do very much more on that.

Mr. ROZEN. I am through with this witness, your Honor.

Mr. MERRITT. I am through with the witness.

IRVING DIAMOND, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. ROZEN:

Q. Where do you reside, Mr. Diamond?—A. 160 Riverside Drive.

Q. By whom are you employed?—A. Bellmore Dress Company.

Q. Where do they do business?—A. Do business in New York, 463 Seventh Avenue.

Q. What is the nature of their business?—A. Manufacturing dresses.

Q. Are you in the Arsenal Building, too?—A. That is right, sir.

Mr. ROZEN. Your Honor, I have some more rent bills and a lease——

Mr. MERRITT. I object to these things going in. I do not see any reason for putting in a half dozen rent bills for all of these witnesses when we have sample rent bills in. If you want to ask how much rent he pays, I have no objection, but

I think we are cluttering up the record with dozens of rent bills.

The COURT. I do not know, but I should suppose you could save the trouble of that sort of thing. You have the lease. Ask him whether he pays for the electricity he uses and whether he pays for his rent and whether he pays for the gas he uses, and so forth.

Mr. MERRITT. Now I might make a statement which may be helpful, Mr. Rozen: I concede that the practice in respect of the payment of rent and payment for electricity and payment for gas by such tenants as use gas, is as properly depicted by the last witness.

Mr. REYMAN. We cannot accept any such concession as that if your Honor please, because it was not depicted in full at all as a typical case. In fact there is evidence in the record quite to the contrary of what Miss Baum stated with respect to electricity. We are trying to be helpful, too.

The COURT. With respect to electricity?

Mr. REYMAN. Yes; Miss Baum said, as I understood her testimony, that the electricity came from the Consolidated Edison Company.

The COURT. She did not at all. He asked about whether the gas came from them and she said yes, "we pay for the gas direct to them."

Mr. REYMAN. All right. I stand corrected. What we are trying to do is show, your Honor, typical leases. The leases all vary. Certainly I think we all know the rent is paid by all tenants.

Mr. MERRITT. My objection did not go to the leases, but my objection ran to offering a lot of rent bills and a lot of electricity bills.

The COURT. You will have to substitute photostatic copies of all of those.

Mr. REYMAN. Yes. So we understand.

The COURT. And it just clutters up the record. I should think you could ask each witness what they do. Here is the lease. All right, the lease has certain provisions. Do you pay your electric bill? Do you pay your other bills, and so forth? You would have to assume that they must have.

Mr. MERRITT. I am willing to concede that they all do pay their rent bills and electricity bills.

The COURT. And they are billed for the electricity on readings of sub-meters by Spear & Company, too. Isn't that a fact, Mr. Merritt?

Mr. MERRITT. Yes; and are paid for on accounts rendered of the kind that are illustrated by Exhibit 29.

The COURT. I don't see why you need go on further than that.

Mr. REYMAN. Yes; that certainly is acceptable.

Mr. MERRITT. And that the rent in each instance is paid for on bills of the kind represented by Plaintiff's Exhibit 28.

The COURT. I think that covers it.

Mr. ROZEN. Very good, your Honor. May we have the lease marked for identification?

The COURT. Yes; you can put the lease in. He does not object to the lease.

Mr. MERRITT. No objection to the lease.

(Marked "Plaintiff's Exhibit 30.")

By Mr. ROZEN:

Q. Do you pay rent to Spear & Company on bills rendered by Spear & Company?

Mr. MERRITT. I thought we covered that by the admission?

Mr. ROZEN. I thought his Honor suggested that I ask the witness. If you think it is covered, Mr. Merritt, all right.

The COURT. I think it is.

Q. What business is your firm engaged in, Mr. Diamond?—A. We manufacture dresses.

Q. Will you describe, in just the barest detail, how you manufacture dresses there, please?—A. First of all, we have our plant in New Jersey, in New Brunswick, and we send all our material out there and we manufacture them out there.

Q. Where do you get the raw silk from, or raw materials?—A. Well, we buy a lot of that from New York silk houses, and we convert quite a lot of that ourselves.

Q. Will you describe that conversion process, please?—A. Well, the converting process is that I buy raw material from mills. I buy the grey goods from various mills throughout the country. They are located in North Carolina, South Carolina, Rhode Island, and many other places throughout the country.

Q. Are they shipped to your place in New York City?—A. No, they are not. We instruct them to ship to our dyers or finishers.

Q. Where are they located?—A. Most of them are located in Pawtucket, Rhode Island.

Q. And then the goods come in to your place, do they?—A. When the goods arrive at the printers I give them instructions as to what patterns I want made and after they are finished I also instruct them to ship it to our plant in New Jersey.

Q. Do the porters clean the halls in front of your premises?—A. I believe they do.

Q. To what extent, if any, do you rely on the building mechanics in the conduct of your business?

The COURT. You mean the handyman?

Mr. MERRITT. To begin with, I would like to know what is this man's relation to this business?

The COURT. I think you are entitled to hear that.

The WITNESS. I do the purchasing of all the materials.

Q. You do not manage the business itself?—A. No, I do not.

Mr. MERRITT. Consequently I object to the question as calling for a conclusion; to what extent he relies.

The COURT. It is the wrong kind of a question. I will sustain the objection.

Q. Are you merely a purchasing agent there, Mr. Diamond?—A. That is right.

Q. What are your duties there, if any?—A. Most of my duties are just purchasing; that is all.

Q. Are you there every day?—A. Yes, sir.

Q. How long have you been employed there?—A. With them four years.

Mr. ROZEN. That is all for this witness. You may inquire, Mr. Merritt.

Cross-examination by Mr. MERRITT:

Q. As I understand your testimony, you buy these grey goods from mills throughout the country?—A. That is right.

Q. And have them shipped to the printing plant or dyeing plant in some places outside of the State of New York?—A. That is right.

Q. And they, in turn, ship them directly to your manufacturing plant in New Jersey?—A. That is correct.

Mr. MERRITT. That is all.

By the COURT:

Q. Grey goods is a general term, is it, that applies to all sorts of unfinished cotton or other goods?—A. Anything, or rayons or cotton or silk.

Q. Then you buy them scattering all over the country, we will say, and then you have them sent where?—A. To either a dyer or printer; in most cases the——

Q. Where are the printers and dyers you use?—A. We use one in Pawtucket, Rhode Island, and the other in Clifton, New Jersey.

Q. And they are instructed in turn to send the grey goods which they have processed, we will say, to your factory at——A. At New Brunswick, New Jersey.

The COURT. All right.

(Recess until 2:30 p. m.)

Mr. REYMAN. Your Honor, we have that Killingbeck decision here, in 20 New York Supp.

The COURT. It is in 20 New York Supp. (2d)?

Mr. REYMAN. Yes, your Honor.

The COURT. Then I will put that other citation also in here, in the Appellate Division.

Mr. REYMAN. Do you have the opinion there?

The COURT. I have this opinion, which is the other one. We had 521.

Mr. ROZEN. 20 New York Supp. (2d).

The COURT. I understand we could not find it, but it is our fault somehow.

Mr. REYMAN. If the Court please, you have mentioned once or twice that there was another case similar to this that had been tried and was pending in this court for the Eastern District of Pennsylvania.

The COURT. Yes.

Mr. REYMAN. We are advised orally that the case has been decided. We have not the opinion, but we hear it has been decided for the plaintiff, the Government. We will furnish you with a copy of the opinion, and also counsel.

The COURT. We will see what it says.

Mr. MERRITT. We expect it this afternoon. We hope to get it this afternoon.

The COURT. What judge decided it?

Mr. REYMAN. Judge Kirkpatrick.

MAURICE R. SPEAR, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. REYMAN:

Q. Where do you reside, Mr. Spear?—A. Great Neck, Long Island.

Q. And you are connected with Spear & Company, one of the defendants here?—A. I am.

Q. You are an officer of that corporation?—A. I am its president.

Q. You are its president?—A. Yes, sir.

Q. You have heard the testimony of Mr. Ferdinand, the superintendent of the Arsenal Building, and we understand that Mr. Ferdinand is an employee of Spear & Company. Is that correct?—A. He is an employee of the Arsenal Building Corporation.

Q. And Spear & Company——A. Are the owners of the property.

Mr. REYMAN. First of all, do you have a copy of the agreement between Spear & Company and the Arsenal Building Corporation?

(Mr. Clifton hands paper to Mr. Reyman.)

Mr. REYMAN. I will mark that for identification. (Marked "Plaintiff's Exhibit 31" for identification:)

Q. I show you, Mr. Spear, the exhibit marked 31 for identification, which purports to be an agreement dated the 23rd of January 1928 between Seventh Avenue and 35th Street Corporation and Spear & Company, Inc.,——

Mr. REYMAN. And may I say to the Court at this time, while the witness has it, that Mr. Clifton has advised that the original of this document is an ancient document and has substituted a photostatic copy, and we have agreed that this is a correct copy.

The COURT. That is the preceding owner, isn't it?

The WITNESS. Yes, sir.

Q. That is, the Arsenal Building Corporation is the successor of the Seventh Avenue and 35th Street Corporation.

The COURT. And now owns the building once owned by the Seventh Avenue and 35th Street Corporation.

The WITNESS. That is right.

Q. Is that agreement in force and effect now, Mr. Spear, between Spear & Company, Inc., and the Arsenal Building Corporation?—A. It is.

Q. It is the same agreement. That is, the terms are the same?—A. I think so.

Q. When did Arsenal Building Corporation become the owner of the building, Mr. Spear, if you know?—A. I do not know.

Q. Approximately?—A. May I find out?

Mr. NEWMAN. December 1935.

Mr. REYMAN. I offer this in evidence, if your Honor please.

Mr. MERRITT. No objection.

(Plaintiff's Exhibit 31 for identification received in evidence.)

Q. Mr. Spear, directing your attention to a paragraph in the exhibit with respect to the fees, we understand that the fees are not precisely the same now as they were at that time?—A. No, they have been changed.

Q. Is Spear & Company the exclusive rental agent at this time, and the managing agent?—A. Yes, sir.

Q. Have they been the rental agent since the building was first opened for business?—A. We were renting and managing agents since it was opened for business.

The COURT. There was somebody else mentioned in the circular that was first put in.

Mr. REYMAN. Yes. Plaintiff's Exhibit 1 mentions Heil & Stern.

The WITNESS. We asked them to cooperate with us in renting before the building was complete.

The COURT. But you were managing agent?

The WITNESS. We managed it from the time of completion but they were co-brokers, helping in the renting of the space.

Q. Referring to this Exhibit No. 1, the Arsenal Building brochure, do you know who was responsible for its publication? Who published it?—A. I could not tell you.

Q. By that I mean who ordered it printed and distributed, if it was distributed?—A. I could not tell you whether we did it or the owners.

Q. What was the date of the construction of the building?—A. 1925.

Q. Do you know whether the brochure was distributed about the same time?—A. Yes, sir.

Q. The names of Spear & Company and Heil & Stern appear as agents on the brochure. Did Spear & Company have it published? Did your company have anything to do with ordering it printed and distributed?—A. I do not know whether we ordered it printed or whether we had it printed, but we did distribute it.

Q. You did distribute it?—A. Yes, sir. That was gotten up to help the brokers rent.

Q. Did Spear & Company at or about the time of the opening of the building advertise its facilities to the general public through newspapers or other publications?—A. We probably did advertise space for rent.

Q. Do you know whether or not advertisements were inserted by Spear & Company, if you recall, in newspapers or trade publications?—A. We probably advertised, with the names of the tenants that had taken space.

Q. The building from the time it was first opened has been known as a loft building and a garment or dress building, is that correct?—A. It has been known as a manufacturing building for the needle trades; dresses, coats, and so forth.

Mr. REYMAN. May I have these marked for identification, if your Honor please?

The COURT. Yes. You can describe them as you go along.

(Photostat marked "Plaintiff's Exhibit 32" for identification.)

Mr. REYMAN. Exhibit 32 for identification is photostat of advertisement for the Arsenal Building, an advertisement of November 22, 1938.

(Photostat marked "Plaintiff's Exhibit 33" for identification.)

Mr. REYMAN. Exhibit 33 for identification is an advertisement of November 15, 1938.

(Photostat marked "Plaintiff's Exhibit 34" for identification.)

Mr. REYMAN. Exhibit 34 for identification being for November 10, 1938.

(Photostat marked "Plaintiff's Exhibit 35" for identification.)

Mr. REYMAN. Exhibit 35 for identification being for December 6, 1938.

(Photostat marked "Plaintiff's Exhibit 36" for identification.)

Mr. REYMAN. Exhibit 36 for identification being for November 30, 1938.

(Photostat marked "Plaintiff's Exhibit 37" for identification.)

Mr. REYMAN. Exhibit 37 for identification being for October 25, 1939.

(Photostat marked "Plaintiff's Exhibit 38" for identification.)

Mr. REYMAN. Exhibit 38 for identification being for October 26, 1938.

(Photostat marked "Plaintiff's Exhibit 39" for identification.)

Mr. REYMAN. Exhibit 39 for identification being for December 14, 1938.

(Photostat marked "Plaintiff's Exhibit 40" for identification.)

Mr. REYMAN. Exhibit 40 for identification being for November 27, 1940.

(Photostat marked "Plaintiff's Exhibit 41" for identification.)

Mr. REYMAN. Exhibit 41 for identification being for January 19, 1925.

(Photostat marked "Plaintiff's Exhibit 42" for identification.)

Mr. REYMAN. And Exhibit 42 for identification being for February 18, 1925.

Mr. MERRITT. Mr. Reyman, I may be able to save you some trouble. This witness does not know anything about this.

He does not handle the building. If you want these identified, suppose you let Mr. Leon Spear look at them and see what the situation is, because you will be wasting time with this witness. Mr. Leon Spear handled this. [After examining.] If your Honor please, I understand the Government intends to offer these in evidence. I will concede what could not be proved through this witness, that these advertisements were made in fact at the respective dates which they bear, but on the offer I shall object to them as entirely irrelevant.

The COURT. I do not see what they have to do with it.

Mr. REYMAN. I have not developed the necessary foundation for the offer yet, if your Honor please, but I am willing to make the offer or continue with my examination of the witness. I had hoped to show, and I think we can show, that the Arsenal Building from its opening has been a building intended to be occupied, and that its owners and agents hoped it would be occupied, by the type of tenant which is in there now; that is, the majority of them; manufacturing dresses and selling them.

The COURT. There is no dispute about that, is there?

Mr. MERRITT. None whatsoever, and the witness has so testified.

Mr. REYMAN. There is nothing in them about the building being occupied by the kind of tenant that does occupy it.

The COURT. I had gathered from the previous history of the building that it had been built for that purpose, but I do not think that would bring the people who built the building under this Act or anything of that kind.

Mr. MERRITT. I would not want to go so far as to say the building was erected to be used exclusively for this purpose. It is thoroughly adapted to any kind of purpose, but I would go so far as to say, as testified by Mr. Maurice Spear, that it has been known as a loft building for the needle trades and that during its entire business existence it has been predominantly——

The COURT. Tenanted by them?

Mr. MERRITT. Yes; so used and tenanted by them.

Mr. REYMAN. We also hoped to prove, your Honor, and perhaps counsel will admit, that during the time the building has been open, the advertising has been directed toward attracting this kind of tenant and that certain advantages of the building have been advertised to that end.

Mr. MERRITT. I do not see that that adds anything to what I have said.

The COURT. You have not any objection to that, have you?

Mr. MERRITT. I will concede that.

The COURT. You see you could not possibly get a law firm, or people like that, to go and settle in that place up there because they would not be able to walk around. It is simply impossible. If you are a New Yorker and know about these things it would seem incredible that anybody else would be using that building.

Mr. REYMAN. That is very true, and if our point is made, and it is in the record, there is no need of our going further. Without pressing the point, but just to make our position a little clearer, in the Killingbeck case, which we have referred to here, and which has been referred to in the briefs, I suppose, Judge Untermyer near the end of the opinion says that "we would encounter insuperable difficulties, however, and would distort the statute [referring to the Fair Labor Standards Act] if we should apply it to employees other than the manufacturer having so remote and indirect relation to the production of the goods as the watchman and the carpenter employed by a landlord, a portion of whose premises have perhaps fortuitously been rented to tenants engaged in interstate commerce."

The COURT. I saw that you were aiming at that adverb "fortuitously." I was aware of it.

Mr. REYMAN. That is right. That is all for Mr. Spear.

LAZARE TEPER, called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. ROZEN:

Q. Dr. Teper, will you please describe your profession?—A. I am an economist.

Q. Do you hold any degrees?—A. I hold the degree of Doctor of Philosophy in economics.

The COURT. From what university?

The WITNESS. Johns Hopkins University.

By Mr. ROZEN:

Q. Have you ever taught?—A. Yes, I taught at Johns Hopkins University and at Brookwood.

The COURT. Where is Brookwood?

The WITNESS. Katonah, in New York. That has been closed for two years.

By Mr. ROZEN:

Q. What is your present occupation, Doctor Teper?—A. Doctor of Research for the International Ladies Garment Workers Union.

Q. How long have you been connected with that?—A. I have been connected with the organization since 1934.

Q. Are you a member of any associations?—A. You mean professional associations?

Q. Yes.—A. Yes; American Economic Association and American Statistical Association.

Q. Doctor, can you give us the volume of dresses in dollars produced in New York State?

Mr. MERRITT. Objected to as incompetent, irrelevant, and immaterial.

The COURT. What on earth has that to do with it? I cannot understand at all.

Mr. ROZEN. What I am trying to develop, your Honor, is the economic background, to show the situation in New York City as a backdrop for this building, to show New York City is the market place for dresses.

The COURT. I know that.

Mr. ROZEN. We all know that, but it is a question of proving the thing and to show the extent of the business.

The COURT. You will admit that this is a great manufacturing place for women's frocks, won't you?

Mr. MERRITT. I will.

Mr. ROZEN. Your Honor, it is one thing to admit these things, but Dr. Teper has gone to some considerable trouble, has had other men working with him, to show these statistics, to show the greatness of this manufacuring center and the extent of it. When we get down to dollars and cents, which means so much, I believe that is a different thing. If Mr. Merritt will concede these things that is different.

Mr. MERRITT. I will not concede them, because they are incompetent, irrelevant, and immaterial.

The COURT. It is immaterial. Often in a non-jury case you let a lot of things in because you know there is no new trial, and you let the upper court wrestle with these matters if they want to. But it seems to me this economic background is almost too much. I cannot conceive of it. The university that he came from is very intimately connected with my family, because the first president of it married an aunt of mine. That was Professor Gilman. I used to go down there a good deal. I know a lot about Johns-Hopkins. It is a great educational institution. There is nothing to criticize about his competence—if he can necessarily be competent on such a vague subject as economic research. I suppose one can look up the statistics on manufacturing, but I do not see what that has to do with our case.

Mr. ROZEN. Merely to show your Honor the extent and the nature of the interstate commerce that is indulged in by the

manufacturing businesses in the garment area of New York City.

The COURT. We are concerned with the tenants of this building. It has already been admitted they are engaged in interstate commerce under the decisions of the Supreme Court. What difference it makes if a thousand other people are also engaged in interstate commerce I do not see. I do not think there is anything in it.

Mr. ROZEN. It presents a very graphic picture of the flow of interstate commerce. The figures I have here I could get rid of in five minutes. I think your Honor would find some interest in them. They may not be conclusive, of course, but I think your Honor will find them interesting in connection with this case, and of sufficient importance and relevance to have them admitted in evidence.

We have had other cases where similar testimony has been offered and received. In this other case, the Kirschbaum case in Philadelphia, in which Judge Kirkpatrick presided, he allowed testimony of a similar nature. As a matter of fact I have a brief here which goes into the matter of the admissibility of the economic background, competitive factors, and so forth; and the Supreme Court of the United States has apparently——

The COURT. Of course those are all filled with footnotes about current history in the Supreme Court. They cite those things a great deal.

Mr. ROZEN. Judge Caffey in the Aluminum case said something about it, too, if your Honor will bear with me.

The COURT. Certainly. I am patient. I do not mind at all.

Mr. ROZEN. He said, "Opinion testimony, by acceptable expert resting wholly or partly on information, oral or documentary, recited by him as gathered from others, which is trustworthy and which is practically unobtainable by other means, is competent even though the firsthand sources from which the information came be not produced in court."

Then we also have some language in the Supreme Court cases, and of course your Honor has already said you are familiar with, and I know you must be, the liberal use that the Supreme Court makes of various economic data and statistics.

The COURT. They can take magazines and other things and cite them, but I did not know they went into evidence, of course.

Mr. ROZEN. This is not material that is readily available from any other source. We have taken the trouble of gathering it together and putting it into concise form.

The COURT. Let me see what you have there.

Mr. ROZEN. I will show it to your Honor [handing to Court]. I do not know whether your Honor can make sense of what is there, but I think you can.

The COURT. What is the ILGWU?

The WITNESS. International Ladies Garment Workers Union.

The COURT. Grey goods you spell g-r-e-y?

The WITNESS. That is my typing, sir. It is not very good.

The COURT. I know it is not. Is that the way to spell it?

The WITNESS. G-r-e-y, yes.

The COURT. I cannot myself see what in the world this has to do with this case. We have completed the orbit of testimony, which included the admissions that these people are in interstate commerce under the decisions of the Supreme Court. The question arises when you get to deal with these marginal people who are just on the edge, and the question whether they are in it or not. But all that stuff does not make any difference so far as I can see.

Mr. ROZEN. As I say, your Honor, it is merely the background and the economic data, and to show in the stoppage of all the elevators in all the loft buildings in New York City how many dollars worth of business it would affect, how many employees are actually engaged in the industry or a segment thereof, how many New York City workers are affected, how many workers outside of New York City would be affected. Dr. Teper can also testify of his own knowledge that he knows certain buildings which are occupied in their entirety by a dress manufacturer, and this dress manufacturer employs maintenance men of the caliber we are talking about here.

The COURT. Do you mean a man who is an individual dress manufacturer should not build his own building?

Mr. ROZEN. Not at all.

The COURT. If they did that some of them might possibly be under your Act, and perhaps all of them, I don't know. I am not deciding that. But when you have a set-up like this, with ownership of the Arsenal Building, and then these people as tenants of the Arsenal, it does not seem to me it is quite the same thing. Of course I have not seen Judge Kirkpatrick's decision, and I think he is a very good judge. It seems to me there are some of these people would not come under your Act. That is my present impression. Some of them probably would come under the Act. But I do not see what on earth this has to do with it. I can understand statistics of various kinds are useful for people who are engaged in

trade and people engaged in the organization of unions, and so forth, but what they mean to me I cannot conceive.

Mr. ROZEN. Simply that in deciding an issue of this kind we thought it might be helpful to your Honor, as I think it has been in other cases, to see the whole picture of the entire situation and not of one isolated little segment thereof. In other words, what are we coming to, what is it leading us to, what does the decision mean, what is the effect on interstate commerce as to some of the employees, how are they engaged in interstate commerce. If you have only one little segment of the background it is hard to get the concept of the issues. We think upon that ground this economic data is admissible.

The COURT. Were you in this case over in Philadelphia?

Mr. MERRITT. I was not, your Honor.

Mr. ROZEN. I was there on the second day of the case, and I have the record here.

Mr. MERRITT. If your Honor entertains any doubt on the question I want to be heard.

The COURT. I would like to hear you on the subject. Was there a tender of that sort of thing made and taken by Judge Kirkpatrick there?

Mr. ROZEN. Dr. Teper did not testify there.

The COURT. I do not care whether it was Dr. Teper or not.

Mr. ROZEN. But we had some witnesses there, yes, your Honor. One gentleman by the name of Peter Wall. I have his testimony here now, your Honor.

The COURT. Was it challenged in any way; did anybody object to it?

Mr. ROZEN. Yes, it was, but the court permitted it to go in. As a matter of fact some of the language used by Judge Kirkpatrick might be quotations from your Honor's remarks, but eventually it was permitted to go in. Mr. Mason who represented the defendant objected to the testimony before he showed how he got his knowledge, because it was without basis.

"The COURT. Well, even so, I don't think it is very important. I don't see the relevancy of this question, as to whether or not—I mean, your object is, of course, to show the necessity of an elevator to the business of a dress manufacturer. Now, it does not make any difference whether these particular dressmakers were engaged in interstate commerce or not."

Mr. Brodie, counsel for the Government, said, "My purpose is broader than that, if your Honor please. * * * My purpose is to show that a strike of building employees will burden, disrupt, and put obstacles in the place of the flow of interstate commerce."

Then Mr. Brodie referred to the Supreme Court decisions, saying that he wanted to show that the effect of the stoppage of the elevators would be to affect interstate commerce, that it was direct and substantial, not slight and remote. And the court finally admitted testimony by Mr. Wall.

The COURT. I would not refuse a summary of this man on the ground he was not competent to make it, but I do not really see what it has to do with this case. Let me hear from you about it, Mr. Merritt.

Mr. MERRITT. The very reasons advanced by Mr. Rozen it seems to me show the infirmity of his position. He has in mind some other building that is operated in another way, owned by the particular manufacturer. Of course we are not concerned, as your Honor points out, with that particular type of situation. He has in mind the volume of business that is being done by all these other buildings and he wants to show the general effect on interstate commerce of what would happen or arise from an interruption due to stoppage of the elevators.

Mr. ROZEN. Pardon me for interrupting you, but I think if you read this you might address yourself to the point.

Mr. MERRITT. I want to address my remarks to what you said.

Mr. ROZEN. I do not want to interrupt, but I think you would find what we are trying to develop there has not anything to do with what you are talking about.

Mr. MERRITT. My remarks are based on what you said so far.

Here is a definite statute applying to a concrete situation. The question is whether it does apply to this particular building. The situation is quite different from setting up an economic background of the course of trade in an antitrust case, where the volume of trade affected and the relation of that particular company to the trade as a whole might become important in determining the broad general words as to what is a combination in restraint of trade. Obviously the trade background is of importance under such circumstances.

But where we are concerned with the question whether an individual workman has engaged in production or transportation of goods for commerce, it would reduce the whole statute to an absurdity if every time a workman brought a suit it was to be treated as a part of the suit that you should introduce broad evidence with respect to what in the aggregate all other people in the same occupations do, and what might happen to the country or community if they all quit work at the same time.

It seems to me we are dealing here with a concrete situation concerning the particular operations of this particular building, and it has no relation to the volume of commerce of the tenants of this building as related to the volume of commerce of the other buildings. The statute is specific and concrete, and limits its application to those engaged in commerce or the production of goods for commerce. The statute provides a workman may begin a suit and he may be entitled to his back wages that have been improperly withheld, plus an equal amount as penalty, and recover his attorney's fee. To say that every time a workman brings up a case of this character all these broad questions of economic background become material, and that the court cannot properly dispose of the question without understanding these matters, would make it impossible for a workman successfully to prosecute.

The COURT. Of course, I do not suppose they would claim that, because all the workman would have to do would be to show that he had been kept overtime without being paid, or something like that.

Mr. MERRITT. But he would have to show he was engaged in interstate commerce or the production of goods for interstate commerce.

The COURT. Yes, and I suppose he could do that by showing what he did vis-a-vis the particular transaction, just as these watchmen have been testifying.

Mr. MERRITT. That is what I mean. If that is the test all this evidence as to general background becomes irrelevant.

The COURT. I do not see what is in it. Really I do not. Of course perhaps I am a little too tender-hearted, because I always feel sorry when you take pains to get things up. I have had cases of unfair competition where I have had to make rulings extremely hard, after the tremendous effort they have gone to to get the testimony. But one really cannot. You cannot let people go outside of the scope of the case you are trying so much. I am inclined to say no to it.

Mr. REYMAN. I wonder if your Honor would hear me just shortly on the same subject.

The COURT. Yes.

Mr. REYMAN. One of the questions of course your Honor is to decide in this case is whether or not certain of these employees are in an occupation essential to the production of goods for commerce, a[illegible] whether or not if they are a cessation of their activities, wh[illegible]ne Congress has defined in Section 2 of the Act as labor disputes, burdening and obstructing com-

merce, might occur. We simply want to show shortly, in line with the general theory of our case—there has been testimony, your Honor will recall, that these employees are all organized in a union, and there is a possibility of labor dispute.

The COURT. I did not see the relevancy of that myself. But nobody objected to it and I did not feel so inhospitable to it that I would not let it in. But here you are putting in something does not seem to have anything to do with the case at all. I really do not think it has. What I have said is that we have this building, and we are only concerned with the set-up that is before us. We are not concerned with buildings of other kinds, or people who own their own buildings.

Mr. REYMAN. That is true.

The COURT. Perhaps a sole tenant of the building, who employs all the help and so on. A hundred different arrangements could be thought of.

Mr. REYMAN. It is a question, of course, whether or not this particular occupation is the kind of occupation that Congress had in mind when it found that labor disputes did obstruct and burden commerce. Now what is the commerce? That is what we are attempting to show here.

The COURT. Nobody is challenging the fact that these people who are tenants are engaged in interstate commerce.

Mr. REYMAN. That is true.

The COURT. It is only a question of common law and common sense as to whether the people who are on the edges and the fringes of that interstate commerce are engaged in interstate commerce or production of goods for commerce to such an extent as to pull them in under the statute.

Mr. REYMAN. If the Court will bear with me one more minute. The court has found that labor disputes do affect commerce. It is well known and we surely do not have to go to any trouble to prove that laboring employees as well as all other employees are organized to improve their wages and conditions if they can. The statute here is a statute that is aimed at a minimum wage and to set a bottom level. If these employees stop work to improve their condition, other employees in the unions may stop work at the same time, and there may be a uniform stoppage of work of these employees.

The COURT. Nothing that can be decided in this case would prevent their going out.

Mr. REYMAN. That is true, but we are simply trying to impress upon your Honor that it is commerce in the broad sense that may be affected. For that reason these employees are covered.

The COURT. As the English judges say, I am not breast high with you. So I will have to sustain the objection, though I am sorry you have taken so much pains about it. You can probably use it somewhere else.

The COURT. There is nothing more to ask him?

Mr. ROZEN. I don't know whether your Honor would rule out all of these questions or not. For example, the question of what percentage of the grey goods manufactured into New York dresses come from outside the state.

Mr. MERRITT. I certainly would object to that.

The COURT. It is just the same thing.

Mr. ROZEN. The reason I wanted that question particularly, your Honor, is because I have a statement here that almost 29 million dollars is the gross sales of this building. If your Honor would get this testimony he would know that approximately 90 percent of the raw materials that went into this 29 million dollars of dresses must have come from outside of the state.

Mr. MERRITT. You mean you are going to ask the Court to infer that this business is in accordance with the general average in this community?

Mr. ROZEN. We will argue that if the Court permits.

Mr. MERRITT. I certainly will object to it.

The COURT. I don't think it has anything to do with it. It cannot affect my views on it one way or the other. I think really if you take this concept of something that leads to commerce "engaged in commerce or the production of goods for commerce," you have to start by getting a concept of just what that means, and what its normal limits would be, and then see whether it spills over, so to speak, on to any of these employees, and I think as I look at the case it is really a question of the common law construction of those contracts, the leases and things, and the management agreements, and all the inter-relations that exists there; and it is not any general question of any kind, so I cannot conceive of how it could be an issue, and if I was in any doubt about it at all I would resolve it in favor of admitting evidence, but I have not the slightest doubt about it.

Mr. ROZEN. I will accept your Honor's decision. I will explain to your Honor why I went into this: In the Kirschbaum case they had every single tenant, and showed how much goods went outside of the state and how much raw materials came into the state and so we developed this chart, your Honor, to show the gross sales and we tried to develop through Dr. Teper that about 90 percent of the grey goods

comes from outside of the state, and we will try to argue from that that each tenant in the building——

The COURT. Aren't there reports of the Department of Labor or something of that kind, that you could put in? You do not have to have evidence?

Mr. ROZEN. I do not know, but Dr. Teper, who is the head of the Research Department of the International Ladies Garment Workers Union, which is a large institution——

The COURT. I know, one of the largest.

Mr. ROZEN. He has said the source of that figure is the Research Department of his place, based on data of the Census of Manufactures. And I have no doubt that we could go to the Census of Manufactures and cull this out, and your Honor could do that too——

The COURT. I assure you his Honor won't do it. I never do anything that is unnecessary, having a sort of inertia that is indisposed to it, but I have not any doubt whatever that those things are not admissible and will not be of the slightest help to me. So I will run the risk in being told that I was very wrong in not admitting it in case the case goes up on appeal.

Mr. ROZEN. I assume my proffer of testimony is properly made, your Honor?

The COURT. I do not know what you have to do to make a proffer of testimony. All I know is that the last question that was asked, and which Mr. Merritt objected to, was objectionable, and I sustained the objection.

Mr. ROZEN. Shall I run down the list of questions?

The COURT. No, I don't want you to run down the list of questions. Make your proffer of testimony. You can say what you want to show without giving the figures, because that is not sportsmanlike.

Mr. ROZEN. No, your Honor, I will abstain from that as carefully as I can. I want to show the volume of dresses manufactured in New York State. I want to show how much of the dresses consumed in the United States is produced in New York State. I want to show the value of the raw materials going to make up the dresses manufactured in New York State. I want to show the percentage of grey goods which is consumed in the state of New York in the manufacture of dresses and how much of it is made outside of the state. I want to show the percentage of the finished goods which is required by the New York State dress industry which comes from without the state. I want to show through this witness the percentage of dresses made in New York State that goes outside of the state. I want to show, too, the num-

ber of people engaged in the dress industry in New York State and the number of people engaged in the dress industry outside of New York State that are working on dresses manufactured and sold through New York City manufacturers or jobbers.

I think, your Honor, I have sufficient testimony about the Garment Center being crystallized as a dress center.

The COURT. Oh, yes. I did not know exactly the area, but now we have even the area of it.

Mr. ROZEN. Yes, your Honor. That is my proffer of proof on that.

Mr. MERRITT. I object to testimony along any of those lines on the ground that it is not related to the issues in this case.

The COURT. Yes, and I sustain the objection.

Mr. ROZEN. May I ask one further question of Dr. Teper:

Q. I ask you whether there is available to you, in your official capacity, the contractors working for the tenants in 463 Seventh Avenue?—A. For some of the tenants.

The COURT. Whether what?

Mr. ROZEN. Whether there is available to him in his official capacity the names and addresses of the contractors working for the tenants.

The COURT. You mean of the people to whom they send goods?

The WITNESS. Yes, some of them.

Q. Do some of those tenants employ such contractors?—A. Yes, sir.

Q. Do you know how many of the contractors are located outside of the state?—A. I cannot testify as to all the tenants.

Mr. MERRITT. No. That is not the question. He asked how many contractors were located outside of the state.

The WITNESS. Yes. I can only testify as to the specific firms in that particular building. That does not include all the firms in that particular building.

Q. How many firms can you speak about?—A. Ten firms.

Q. How many contractors do they employ outside of the state?—A. Fifteen.

The COURT. What difference does it make?

Mr. ROZEN. It makes this difference: if every single tenant in that building, for example, had all these contractors outside of the state, the flow in interstate commerce of goods back and forth, and the use of the elevators to transport the goods up and down, is much more significant than if the contractors are located inside New York City, for example, or located in the building, for example. Interstate commerce is

affected, and these contractors outside of the state are in the stream of interstate commerce.

Mr. MERRITT. You are unconsciously violating your agreement. This is already covered by your stipulation.

Mr. ROZEN. That is the volume, but I asked for the number of contractors. I will leave it to his Honor if I have violated the stipulation.

Mr. MERRITT. I said unconsciously.

Mr. ROZEN. I have no further questions, your Honor.

The COURT. You have made your tender of proof and I have sustained Mr. Merritt's objection to such proof if you did try to put it in, so that makes that issue clear. Were there objections to these last two questions?

Mr. MERRITT. I objected to the questions in regard to the number of contractors.

The COURT. I don't think that is really relevant. I do not think it really has anything to do with the issue. I will sustain the objection.

ARTHUR JOHN NEBEL, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

(Short recess.)

Direct examination by Mr. REYMAN:

Q. Where do you live?—A. 719 Drake Avenue, Roselle, New Jersey.

Q. What is your occupation, Mr. Nebel?—A. Supervisor of the Railway Express.

Q. How long have you been a supervisor for the Railway Express?—A. Sixteen years.

Q. Do you have any particular district or part of New York City as your territory?—A. Part of it is known as the garment area.

Q. How is it designated on the records of the company?—A. 28th Street to 59th Street, and Fifth Avenue to North River.

Q. Will you state generally what your duties and functions are as supervisor?—A. Well, to contact the activities of all the expressmen, that is, the Railway Express men, working in that territory.

Q. That includes the drivers of the trucks?—A. Yes.

Q. How many truck drivers do you have in that area?—A. At the present time we have 658 drivers.

Q. Are you familiar with the premises at 463 Seventh Avenue, the Arsenal Building?—A. Yes.

Q. And that is within your district, of course?—A. Yes.

Q. How many Railway Express trucks serve that building; that is, deliver and pick up there?—A. We would probably have eight to fourteen trucks that would go to that building each day.

Q. The express company has space within the building, we understand, across the sidewalk where it takes its trucks in to pick up packages?

Mr. MERRITT. I object to the form of the question, "has space."

Mr. REYMAN. I will withdraw it.

Q. What are the arrangements at the building for the picking up first of outgoing shipments of express?—A. Well, the building has prepared a chute from the top to the mezzanine floor and at the mouth of the chute there is a room, say about 14 by—well, practically the length of the building less about 30 feet, and when the shipments reach the mouth of the chute of course they are taken from there and carried to the end, toward the 35th Street end of the building, and there is a space allotted to us also for the truck to back in, that is, across the sidewalk, for ease and quick handling.

Q. When you say the space is allotted to you, who allotted the space?—A. The building.

Q. It is the building's space?—A. Oh, yes.

Q. Does the Railway Express Company pay rental, if you know, for the space?—A. No, we do not.

Q. With respect to the chute, what degree of control does the Railway Express Company exercise over the chute within the building at the various floors?—A. Do you mean maintaining them?

Q. Yes.—A. Well, we do not maintain the building at all; that is taken care of by the building with the exception that if a lock breaks on one of the doors on one of the floors—those doors are locked on each floor——

The COURT. The doors that lead into the chute?

The WITNESS. Yes.

The COURT. And your men have keys to the locks?

The WITNESS. Yes, your Honor.

Q. For each lock on each floor?—A. That is right.

Q. Do you know whether or not the Railway Express Company or its employees do anything toward keeping the chute in repair and maintaining it?—A. No; the building takes care of the chute other than the locks, if we should break them ourselves——

Q. You are in duty bound to replace them?—A. If we should break them we are to replace them.

Q. In the space allotment which you have spoken of, are there electric lights provided?—A. Yes; there are.

The COURT. The place where they come in?

Mr. REYMAN. Yes.

The COURT. Where is that exhibit that we had here yesterday, that little sketch?

(Defendant's Exhibit A handed to the Court.)

By the COURT:

Q. Here they tell me is a drawing which shows the building. This is the Seventh Avenue entrance that comes in here?—A. Yes.

Q. This is the place for the express truck on 35th Street [indicating]?—A. Yes, sir. That is the level of the street.

Q. And this is the spiral chute, that comes down from upstairs [indicating]?—A. Right here, yes, sir.

Q. Then they have to get things from the mezzanine floor down to the next floor below?—A. From the mezzanine floor. That is about 8 feet higher than the street level.

Q. And your trucks, of course, are on the street level?—A. That is right.

Q. So that eventually after they get them off the spiral chute they slide them down in some way, on a skid or something or other—A. Gravity rolls.

Q. Onto the level where you can load them, is that right?—A. That is right.

Q. So when it comes off the spiral chute, which is for the use of the express company, they come down the gravity rollers down to the street level?—A. They go just about that high, and from here there is a little drop [indicating].

Q. This is all level here?—A. Yes.

Q. How do you get the bits of luggage or goods from the spiral chute over to the loading platform?—A. It comes right out here. Over here we have gravity rolls [indicating]. That is, there are two bars and they have a roller across like you see on a typewriter roll. It is aluminum——

Q. But the rollers are run by no power other than their own?—A. No motive power.

Q. They are just there to ease the things along?—A. That is right, sir.

Q. And you push the things on and they are just pushed on until they come to a little drop where this is marked "Loading platform"?—A. That is right.

Q. They drop onto the loading platform?—A. This platform here is probably three or four feet deep, but from this

height, about eight feet, there is a little shelf, about that wide [indicating] that permits it to drop right onto the vehicle.

Q. Like a skid of some kind?—A. A tin slide.

Q. You mean slanting?—A. Yes.

Q. Wouldn't you call it a skid then?—A. Well, we have different terms for it.

Q. What do you mean by having the word "chute" down here?—A. It is just the term given to it. It has a side to it, of course.

Q. This is a chute that leads from the loading platform down onto the tailboard of the vehicle?—A. No; it loads down from the mezzanine floor.

Q. Is that the same level as the mezzanine floor?—A. The loading platform?

Q. Yes.—A. No.

Q. There is a drop to get to the loading platform?—A. About six foot.

Q. It is further down still to get to the place where your tailboard is.—A. The chute is so arranged that when it comes down it will drop about this high [illustrating] from the vehicle.

Q. So it get into the driver's hands or the hands of one of your expressmen, and he transfers it from the loading platform by this chute?—A. That is it, by the chute. It does not touch that loading platform at all. This portion here [indicating] is level with the street and this loading platform, as it is called, is about a foot and a half high.

Q. From the street?—A. From the street level; and our truck would be about that high [illustrating]. We put a chute there so it would come off these gravity rolls and drop right down to that level under the vehicle.

The COURT. All right.

By Mr. REYMAN:

Q. Is space provided on any of the upper floors of the building for the use of the express company?—A. Well, the hallways are regular passages for anyone.

Q. Do you have any special stations within the building, or desk space?—A. Well, in the neighborhood of four o'clock in the evening, from four o'clock on, we had use of four floors where the tenants come to that particular spot. If they have three or four or five they will carry them.

The COURT. You mean three or four or five packages?

The WITNESS. Yes.

Q. On which floors are those stations?—A. I am not quite sure.

Q. They are not on adjoining floors?—A. No; they are four or six floors apart.

Q. I asked you a few moments ago, Mr. Nebel, about the lighting. That is furnished by the building, I think you said?—A. Yes. I don't know whether you asked or not, but it is.

Q. In any of the space used by the express company, is such space heated?—A. I am not sure whether there is heat there or not. I think there is heat in the little office they have closed off in 35th Street, at the 35th Street end of the building, the portion of the mezzanine floor that goes around the open driveway. I think they have an electric heater in there.

Q. Do you know whose heater that is?—A. I think it is one of the boys.

The COURT. One of your boys?

The WITNESS. Yes.

Q. You have been asked, under subpoena I believe, to produce certain records with respect to deliveries and pick-ups at the Arsenal Building?—A. Yes.

Q. The records which we asked you to bring are the records of the Railway Express Company. Are they kept under your direct supervision?—A. Yes.

Q. And do you have with you the ones that we called for?—A. I have.

Q. From your records, Mr. Nebel, can you state the percentage of out-bound shipments from the Arsenal Building for the last year which went outside New York State; that is, the shipments by express that were destined out-state?—A. In 1940?

Q. Yes.—A. Throughout the year about 85 percent or more, goes out of the state.

Mr. MERRITT. Isn't that already covered by this statement in evidence?

Mr. REYMAN. No.

Mr. MERRITT. Now, if your Honor please, here is the statement which has the percentage of every single tenant there and and the amount that is sent out of the state and the amount in the state.

Mr. REYMAN. Mr. Nebel is not testifying for any single tenant. We are simply trying to show that so far as shipments by express are concerned—I will connect it up and make the offer—the amount of shipments, the number of shipments made, and so on.

The COURT. What difference does it make whether by express or anything else? I cannot understand what difference it makes what vehicle it goes by.

Mr REYMAN. That was a purely preliminary question, if your Honor please. It may be covered by the chart. If it is not, it is included in the figures shown on the chart, that is true, so I won't pursue the question.

Q. You occupied your present position during January and February of 1939, Mr. Nebel?—A. Not in that district in January 1939, but from February 1st, 1939; from that time on.

Q. From February 1st?—A. Yes, 1939.

Q. When you came into that district you then became the one in charge of the books and records?—A. Yes.

Q. Of the district?—A. Yes.

Q. You were requested to prepare from your records, and have you prepared, a statement showing the delivery count at 463 Seventh Avenue for January and February 1939?—A. For portions of the month.

Q. Just which figures do you have?—A. 1939, January 17th until January 31st.

Q. And for February?—A. February 1st to the 15th.

Q. Do you have the statement for each one of those days with respect to deliveries at the building?—A. Yes, sir.

Q. Do you have the same figures with respect to pick-ups at the building for those particular days during 1939?—A. Yes; the exact days.

Q. You have that on a sheet of paper, have you?—A. Yes.

Q. Do you have those statistics for those days as to deliveries and pick-ups for the years 1938 and 1940?—A. I have the period in 1938 of January, that is the last week in January, and the first three weeks in February for the deliveries and the pick-ups; that is the inbound and the outbound.

Q. For 1940 what figures do you have?—A. 1940 I have those prepared for the month, for each month of the year.

(Papers marked "Plaintiff's Exhibits 43 to 46" inclusive for identification.)

Q. I show you the exhibits so marked, Mr. Nebel, consisting of four sheets, and ask you whether or not those figures conform to the figures you have which you say you have taken from your records.—A. Yes. These are the same figures.

The COURT. That is the period of the strike?

Mr. REYMAN. Yes; that is the period. It is comparative.

Mr. MERRITT. I shall object to these figures on the ground that they——

Mr. REYMAN. They are not offered as yet.

Mr. MERRITT. Excuse me.

(Plaintiff's Exhibits 47 and 48 marked for identification.)

Q. I show you Plaintiff's Exhibits 47 and 48, both marked for identification, Exhibit 47 purporting to be the pick-up

count for the months of the year 1940 and Exhibit 48 purporting to be the delivery count for the months of the year 1940 [handing to witness], and ask you whether those figures are shown or reflected on your books, whether these are the totals as shown by the original records.—A. The original records would be the performance cards, if that is what you mean.

Q. Yes; and you have prepared these sheets from the original records?—A. From those performance cards, yes.

Q. Which are available here for examination?—A. Yes.

Mr. REYMAN. These are offered in evidence, if your Honor please, Plaintiff's Exhibits 43, 44, 45, 46, 47, and 48 now marked for identification.

Mr. MERRITT. I object to them. May I see them, please?

The COURT. I thought you had seen them.

Mr. MERRITT. I have, but I want to speak from them. Because they present an unfair picture and do not present comparable figures. If the witness is in a position to give us the same data as to the entire month of January 1939, and the entire month of February 1939, the point of my objection is taken care of. But he has picked out certain portions of a month for one exhibit, he has picked out another portion of the month of January for Exhibit 45 for identification, and he has picked out the entire month of January for Exhibits 47 and 48 for identification, dealing with 1940.

Now I do not want to be put in the position of allowing these to go in in this way unless the witness has here and is prepared to give us the comparable figures instead of handpicked figures like these.

The COURT. I do not understand why they should not be for the whole period of two months or whatever it is.

Mr. REYMAN. In fairness to Mr. Nebel, your Honor, the figures presented by these exhibits are as requested by us.

The COURT. Yes. I understand.

Mr. REYMAN. And we have available the basic books in the courtroom for examination. We are perfectly willing to reserve our offer or to make the offer contingent upon supplying the figures Mr. Merritt asked for.

The COURT. I will sustain the objection for the time being and deny the admission of it until you show him the period of two months.

Mr. ROZEN. We have them here.

The COURT. Add them up.

Mr. ROZEN. They can be read right off the daily totals.

Q. Are these records for other days of months in 1938 and '39 available so that we can read them off into the record

now?—A. Not 1938 and 1939, you have not those. You only have the period at this time.

Q. Can you give us those figures tomorrow morning at 11 o'clock and make them available to us?—A. I am not quite positive of that, because we will have to get them out of storage.

Mr. MERRITT. Then the original records are not in the courtroom.

The WITNESS. What is here; yes.

The COURT. The original records of these things are here.

Mr. MERRITT. It is a portion of the picture.

Q. What records do you have here; what does the book you have with you show?—A. The book only shows the total count of shipments in the garment area.

Q. So to get the daily shipments we would have to refer to the cards you have there?—A. Yes.

Q. And the cards for the period——A. Are absent for those two months. They are in storage. But the latter part of 1940; all the cards are here for 1940.

Q. How long did it take to get them?—A. It took over half a day.

The COURT. I will deny admission of them for the time being. Why did you pick out this particular period? I do not understand it.

Mr. REYMAN. It is a comparable period, your Honor. They cover the latter part of January 1939, up until the middle of February, and on the 1st and 2nd of February according to the testimony already in the strike was going on, the strike to which we referred. The figures are not intended to be unfair in the least, and simply reflect the amounts of pieces picked up and delivered over that period of time. As a matter of fact we had assumed we were being very fair in picking the days we did.

Mr. ROZEN. As a matter of fact, if there is any blame for that I ought to take the blame. But we wanted to take the shortest possible period so as not to burden your Honor.

The COURT. February 1939, was that the time of the strike?

Mr. ROZEN. Yes. Two weeks before and two weeks after would be a representative period. I do not know whether it went on in January or after that. But we wanted a picture to show your Honor the effect of the strike. I know there won't be anything else there that helps that picture. It is a very fair representation, as Mr. Nebel testified.

The COURT. The deliveries are shown, and the pick-ups. They would be things that would go down by the chute, would they?

The WITNESS. The pickups; yes, your Honor.

The COURT. That was not as much affected as the deliveries?

The WITNESS. No.

Mr. REYMAN. The comparison was aimed primarily, your Honor, at the period around Easter time, the period preceding Easter and the period after. Is that right?

The WITNESS. That was the thought in mind when they asked me to get those records. That is, it would give the fairer picture. That is, to my mind it would.

The COURT. The delivery count fell off very considerably, and as a matter of fact the pick-up count did not fall off very much.

Mr. MERRITT. I am willing to concede that to be a fact, during the period of the strike.

The COURT. I do not understand exactly the rest of the figures and what their rationale is.

Mr. REYMAN. To which one of the exhibits is your Honor referring?

The COURT. I am looking at all six exhibits. Of course I understand the purpose and suspected from the first the purpose was to show, so far as the American Express Company was concerned, that the strike reduced interstate shipment. It does show for the first three days of February 1939, as a matter of fact, a reduction of delivery counts. That is where they were sending the things in.

Mr. REYMAN. Yes.

The COURT. And the first three days of February as far as the pick-up counts are concerned they are pretty good, much bigger for the first two days than they are for the others. I suppose that was because there had not been any work done there or very little work done, and therefore there were not so many things to be shipped out for two or three days after the strike as there were during the strike, when they had been prepared.

Mr. REYMAN. That is true.

The COURT. They were sent down the chute, and that was that.

Mr. REYMAN. Yes, sir; that is it.

The COURT. I do not see that these things are particularly unfair.

Mr. MERRITT. The thing I object to is the 1940 figures show the entire month, the 1939 figures show fractional months of January and February. I think if we had the entire month of February 1939, and January 1939, it would show there was no shrinkage whatever during the entire month.

The COURT. I should think that is fair enough. I do not know enough about these seasons, but I should suppose there would be times when there were more shipments than at other times. There is a great variety in these figures, an enormous variety.

Mr. MERRITT. The 1st of February is moving day, as we all know. The leases terminate the 1st of February.

The COURT. There is a great variety of figures, and the figures do not show much if anything except the delivery count was smaller on the days of the strike and the next days, and the pick-ups were much lower on February 3rd. They were about one-half what they were on February 1st. It does seem anybody would know that they are engaged in interstate commerce and cannot ship the things out. It would go without saying. Nobody is interested in these precise figures. It is not a question of tallies or anything of that kind. All we want to know is, did it have an effect? And of course anybody would know it would have an effect if people were not shipping things out. Just when the effect would begin and when it would cease I suppose would depend, as I just said, on what had been done before the strike began, and then during the strike little being done you would not have many things to ship.

Mr. REYMAN. That is the sole purpose of the first four exhibits there, your Honor. You notice we have taken the delivery count and pick-up count for the whole year 1940 as to shipments and a part of the whole year as to pieces.

The COURT. Of course they do not compare.

Mr. REYMAN. It is not intended for comparison. It is intended to show the business or interstate shipments made by this one concern, which of course we all say is admitted in theory. This is a precise showing of the number of shipments for the several months, the actual number of pieces shipped and admitted into the building.

The COURT: You say admitted in theory, but it is in fact. These people were in interstate commerce. I had supposed when we had gotten that far we would not have much else to do. I do not see what the purpose of these things is. But I think probably Mr. Merritt is right in saying that certainly the year 1940 figures are of no comparable value with the other figures as showing the effect of anything. The other figures have some value in 1939 with respect to the strike. I do not think they get any nutriment out of it.

Mr. REYMAN. Of course it is for your Honor to say what the weight is. It is for you to say what their weight may be.

We think they are relevant and admissible, and I am surprised to think they might be considered unfair.

The COURT. I do not know whether you can call them unfair, but they are inconclusive. I think that is what he really meant.

Mr. REYMAN. They are corroborative of other statements made during the course of the trial.

The COURT. If you want to do something more about them tomorrow I rule against you at the moment.

Mr. REYMAN. I reserve it, then.

The COURT. Perhaps it may be well to take it up again, I don't know.

Q. How many employees are there of the American Railway Express in District 3, the total number?

The COURT. First, what is District 3?

Mr. REYMAN. That is the district of which Mr. Nebel is supervisor.

The COURT. Do they designate them that way?

The WITNESS. They designate it by number in our service.

Q. How many employees are there in that district?—A. 1,132.

Q. Of that number how many are engaged in driving trucks?—A. There are 800, a little over 800, that drive trucks, known as drivers.

Q. How many trucks do the drivers have to drive?—A. Well, today we are operating 368. We are right at the height of our season right now.

Q. I believe you stated the number that served the Arsenal Building, but I will ask you again the number of trucks.—A. In and out—on the in-bound and out-bound?

Q. Yes.—A. 8 to 14.

Mr. REYMAN. I think that would be all for Mr. Nebel today, although I will ask permission to recall him for the additional statistical data.

Mr. MERRITT. I will reserve my cross examination.

(Adjourned to Thursday, April 3, 1941, at 11 a. m.)

NEW YORK, *April 3, 1941, 11:00 a. m.*

TRIAL RESUMED

The COURT. Did you say there was some correction to be made in this opinion from Philadelphia?

Mr. REYMAN. Yes; we are rather embarrassed by it. We received one copy and then had these extra copies made and we were told they had been compared.

On page 6 of the copy you have, in the last sentence in the first incomplete paragraph it should read:

"It is thus the nature of the employees' occupation," etc.

The COURT. How did you get that? From the carbon copy sent to you?

Mr. REYMAN. Yes. Here is the copy sent us which says "employees." We had it copied, your Honor, and that is how the error occurred. It should read, "It is thus the nature of the employees' occupation which determines whether or not the employer is, so far as the employee is concerned, subject to the Fair Labor Standards Act."

Mr. MERRITT. I assume that is what is meant from the general nature of the opinion. It seems to me that is probably what is meant.

Mr. REYMAN. That is the way it should be according to the copy furnished to us from Philadelphia.

The COURT. All right. I think in spite of that opinion we will have to have a little bit of exploration on some of those things to satisfy me thoroughly.

Mr. REYMAN. I hope we can supply it to your satisfaction, your Honor. Shall we proceed?

ARTHUR JOHN NEBEL, resumed the stand.

Direct examination continued by Mr. REYMAN:

Q. Mr. Nebel, yesterday you had identified certain sheets prepared by you as containing summaries of figures taken from permanent records maintained by your company and under your supervision. I am referring to Exhibits 43, 44, 45, and 46 for identification, which I show you. Exhibit 43 contains figures showing delivery count from January 17, 1939 through February 15, 1939, showing shipments and pieces, and you were asked to prepare figures covering not only that period but beginning with the first part of January and the latter part of February. Do you have those figures?—A. Yes; I have those here now.

Q. And do you have the basic cards?—A. Yes; the additional cards are in that pack on the table.

Q. Now referring to Exhibit 44, which shows the pick-up count for the periods I first referred to, the latter part of January and the first part of February, do you have the figures for the first part of January and the latter part of February also?—A. They are all together in this report.

Q. And Exhibit 45, showing delivery counts for the periods. Do you have the additional days for those?—A. For January and February.

Q. And the ones shown on Exhibit 46, the pick-up count for January and February 1938, do you have the full figures for those two months?—A. Yes; for both of those.

Mr. REYMAN. May I have these marked for identification, please?

(Marked Plaintiff's Exhibits 49, 50, 51, and 52 for identification.)

Q. These exhibits which you have just handed me, and which have been marked since you handed them to me, are: Exhibit 49 for identification contains the figures of the delivery count for the full months of January 1938 and February 1938?—A. That is right.

Q. As just described by you; is that correct?—A. Yes.

Q. And Exhibit 50 for identification shows the delivery count for the full months of January 1939 and February 1939, as just described by you?—A. That is correct.

Q. Exhibit 51 for identification shows the full pick-up count for January 1939 and February 1939 as just described by you?—A. That is right.

Q. And Exhibit 52 for identification includes the pick-up count for the full months of January 1938 and February 1938 as just described by you?—A. That is right.

Q. And the basic records from which these totals were taken are here now?—A. Yes, they are on the table.

Mr. REYMAN. These are offered in evidence, Mr. Merritt. I offer Exhibits 49, 50, 51, and 52 now marked for identification, in evidence, your Honor.

Mr. MERRITT. I have no objection.

(Plaintiff's Exhibits 49 to 52 inclusive for identification received in evidence.)

Mr. REYMAN. And the offer made yesterday afternoon as to Exhibits 43, 44, 45, and 46 will be withdrawn since the figures included thereon are included in the exhibits just received.

Q. I show you Exhibit 47 for identification and Exhibit 48 for identification, which you stated yesterday included the pick-up counts and the delivery counts for the full year of 1940 by months, and as to shipments for each month as a basis for the first seven months, and ask you whether or not the basic record——

Mr. MERRITT. That was testified to yesterday.

Mr. REYMAN. They were not in the courtroom yesterday.

The COURT. No, I don't think they were.

Mr. REYMAN. The records were not here and that is why you objected.

Mr. MERRITT. No, that is not the reason. You may offer them and I will make no objection.

Q. But the basic records are now here in the courtroom, is that correct?—A. Yes, those cards.

Mr. REYMAN. They are offered in evidence.

(Plaintiff's Exhibits 47 and 48 for identification received in evidence.)

The COURT. I understood that the reason he objected was that the exhibits were not a fair picture.

Mr. REYMAN. Yes, as to the first four exhibits, and I reserved my offer on the last two because the records were not in the courtroom. I had thought they were, but they were not.

The COURT. I did not know of a differentiation of that kind.

Mr. REYMAN. I am sure he did not object as to the last two, but the record was still open on their offer. That is all, Mr. Merritt.

Cross-examination by Mr. MERRITT:

Q. You gave some testimony about this chute in the building which your company uses in connection with the receipt of goods from the tenants in this building. Have you ever known of any repairs being made by the owner of the building on that chute?—A. The particular chute itself you are referring to? Not the doors?

Q. Yes.—A. To the chute itself, no. It is a steel arrangement there and I don't think it will ever have to be repaired.

Q. Has the question ever arisen as to whose responsibility it is to keep that chute in repair?—A. No, we have never taken it up directly with the building, except that we had to keep the locks in repair.

Q. That your company does?—A. That is right.

Q. And if there is a jam in the chute you take care of cleaning up that jam there—your own people?—A. You mean the freight being stuck in the chute?

Q. Yes.—A. Yes, sir.

Mr. MERRITT. That is all.

Redirect examination by Mr. REYMAN:

Q. Do you know who does the cleaning in the areaway where your trucks back in at the foot of the chute?—A. That is generally taken care of by the building people but we try to keep it as clean as possible so we don't annoy those people with it.

Q. Has that space ever been painted, to your knowledge, since the express company has been using it?—A. I cannot be too sure about that.

Mr. REYMAN. That is all.

Re-cross-examination by Mr. MERRITT:

Q. Are you quite sure that the building people keep that areaway into which you back your trucks clean?—A. Don't misunderstand me. When I say that I say the building has at different times cleaned because there is other rubbish that blows in from the street and we attempt to keep it as clean as possible at all times.

Q. You regard that as a responsibility of your company, do you not?—A. Certainly; yes, sir.

Mr. MERRITT. That is all.

GEORGE WASHINGTON SILVERA, recalled as a witness on behalf of the plaintiff, testified further as follows:

Direct examination by Mr. REYMAN:

Q. Mr. Silvera, will you state, please, how or in what manner you make your reports of the work you have done, during the usual course of your duties, to Mr. Ferdinand, the superintendent?—A. Well, at times I get orders in writing from Mr. Ferdinand as to what I am to do, other times verbal from him direct, and sometimes through an intermediary, some man he will tell it to, who will deliver it to me. And then at the end of the day or the following day as the work is consummated I make out my reports and turn them in daily, or the second or third day following—turn in two or three sheets at a time, and so on, as this work is done.

Q. The reports that you make to him, do they include just the work done by you, or do they include work which is done by others of the employees in the building?—A. It includes work done by others in the building, where I got orders on the work, like knocking down walls, or having the porters clean up lofts, and so forth and so on. That means if I put down Schneck, had porters clean up Schneck's place, naturally the porters did the work. You will find it in those reports along those lines, I believe.

Q. Do you make daily memoranda or notes of the work done by you?—A. Do I keep a record for myself?

Q. Yes.—A. Only recently I did. I have not done it all the time. I have not always done it.

The COURT. Almost all of those orders that we had, which were put in and which were dated, were very recent, of very recent dates. I wondered how they happened to be all bunched up in March.

Q. His Honor is referring to these sheets which are variously marked Plaintiff's Exhibits 6 to 14 [handing to witness]. I

show them to you. The dates appearing on these slips. I ask you first whether or not you have ever seen these slips before?—A. Oh, yes; definitely.

Q. Where have you seen them?

The COURT. What are they?

The WITNESS. Sir?

The COURT. What are they?

The WITNESS. They are work orders from Mr. Ferdinand.

Q. With respect to their dates, did you put the dates on them?—A. I believe I put the majority of them on. In fact all of them, I guess. I think I put them all on.

Q. With respect to them generally and individually, when were the dates put on?—A. When I received them.

Q. That is, you dated them on the day that you received the order?

The COURT. That is your handwriting, the dates?

The WITNESS. That is right.

Q. Now, with respect to this particular one, Plaintiff's Exhibit 9, the lower part of this, do you know whose handwriting that is [indicating]?—A. Yes; those are some notes I jotted down on some work I done, so that when I made out my report I would have a record or memorandum to make the report out from.

Q. I show you a folder marked Plaintiff's Exhibit 3, containing 30 sheets [handing to witness], and ask you whether or not you have seen any of those sheets before, or whether you are familiar with them?—A. These look like our usual time sheets to me. We usually——

Mr. MERRITT. Just a minute. There is a question and he is not answering the question. Will you read the question?

Q. (Read by reporter.) A. Well, the usual time sheet, your Honor, is signed by me weekly. This has not got a signature on it, so I cannot say definitely I have seen them or not.

Q. You know they are time sheets?—A. Yes.

Q. You know the usual form used?

Mr. MERRITT. Just a minute. You are leading abominably.

The COURT. You have Mr. Ferdinand here.

Mr. MERRITT. Yes.

The COURT. You can find out whether they are time sheets.

Mr. REYMAN. That is not the point of the inquiry at all.

The COURT. What is it for?

Mr. REYMAN. We admit their validity: I simply wanted to know if this is the usual form of the pay roll, and the usual

titles. That is what I am driving at. Or the job description on the sheet.

The COURT. Ask him about the job description.

Q. Refer to this column, and the name is followed by a description of the job [indicating]. Are those the usual titles given to the employees?

Mr. MERRITT. Wouldn't it be far better to ask him what the titles were? He is your witness. You are trying to prove things by him. I do not know what you are leading up to. This has all been taken care of by evidence.

The COURT. It is in evidence, this exhibit.

Mr. REYMAN. Yes.

The COURT. I do not understand it myself. However, go on.

A. I would say these are correct.

The COURT. They are correct?

The WITNESS. I would say these are correct.

The COURT. All right, the titles are correct, then.

Q. As to the porters employed in the building, are the duties of all of them more or less similar; that is, do they vary as to individuals, or do they do the same work generally in the building?—A. They are very similar.

Q. Do the porters ever do anything other than clean the hallways and stairways, and generally clean up, and tearing down of walls and so on; do they relieve on the elevators?

Mr. MERRITT. I object to that. Obviously this is an attempt to lead this witness into saying that the porters do elevator work, thinking that possibly that might affect your Honor's decision in regard to porters.

Mr. REYMAN. No; that is not the purpose.

Mr. MERRITT. If it is not the purpose I would like to know what it is. And you distinctly lead him. I object to the question as leading.

The COURT. The question is leading, yes, very leading.

Mr. MERRITT. That is my objection to it.

The COURT. A leading question assented to by the witness is not taken as proof at all. I have an English decision in my book, a case in which a whole patent was lost by having a question put that was so leading the judge said he could not pay any attention to it, the witness was just assenting to what the question had said. It is quite a leading case. Limited vs. Edward G. S. Brinsmead. It is XXX R. P. C.—that is Reports of Patent Cases—30, page 513. It is an opinion by Lord Justice Hamilton, who afterwards became Lord Sumner and who was regarded as the greatest British judge of his generation.

So it really does not pay. You can feel its lack of effect as you sit here. So it is a great deal better to ask him direct questions. If there is the slightest objection to it you have to.

Q. Will you describe generally, Mr. Silvera, the duties of the porters in the building, as you know them?—A. The duties of the porters as I know them, they are allotted certain floors to take care of the toilets and so forth and general cleaning work, relieve on the elevators, relief periods from 11 to 12, and some of them operate at night after hours. My assistant goes on the car at 5 o'clock every night, the fellow who assists me, Arthur Lipsman, and he works I believe to 7, 5 to 7 I think it is at night. And the other porters relieve midday, as I said, from 11 until 12.

Q. Do they relieve any others of the employees in the building?—A. Not that I can think of at the present.

Q. With respect to the elevator operators, do they have any other duties than running the cars?—A. Oh, yes, there is the starter relieved, gets a relief around noontime, generally by my assistant Lipsman.

Q. Lipsman is not an elevator operator. Do the operators—are they assigned at any time to other duties outside of running the cars up and down?—A. Only occasionally, an emergency, to run an errand or something like that to the office, but otherwise I cannot think of anything that they do otherwise.

Q. With respect to holidays and Sundays, are any of the employees at any time ever called upon to act in a job other than their usual job, during ordinary workdays?—A. I don't think so.

Q. How many firemen are employed in the building?—A. Two.

Q. Are they both there in the day, or do they have different shifts?—A. They come in the daytime. One goes off at——

The COURT. They are staggered shifts.

The WITNESS. They are staggered shifts; they are not all there together.

The COURT. We have had that before.

Mr. REYMAN. I think that is all.

Cross-examination by Mr. MERRITT:

Q. What have you done to prepare for your testimony in connection with this case?—A. To prepare for it?

Q. Yes, sir.—A. Why, I kept those reports and turned them in to Mr. Rozen and——

Q. You did that in order to prepare for this case?—A. What is that?

Q. You did that in order to prepare for this case?—A. Well——

Mr. ROZEN. I don't like that examination, your Honor—prepare for this case.

Mr. MERRITT. This is cross-examination.

The COURT. It is cross-examination.

Mr. ROZEN. I know, your Honor, but I think he is taking advantage of Mr. Silvera's position in this case. I think we ought to play fair with witnesses. I asked Mr. Silvera to keep a record of what he did. There was no preparation except in that way. He kept a record of his daily routine.

The COURT. Just the last few weeks or something like that?

Mr. ROZEN. He kept that for me. But he testified he always kept a record in his log book. Mr. Ferdinand testified to that.

The COURT. Yes; but all of those records you put in.

Mr. ROZEN. Yes, sir.

The COURT. All dated quite recently.

Mr. ROZEN. Yes, your Honor.

The COURT. The result, or at least so it struck me, was a summarization of a lot of things he was doing outside of his ordinary habits.

Mr. ROZEN. No, your Honor. The exhibits that are in evidence were not prepared by this witness at all, they were prepared by Mr. Ferdinand and given to Mr. Silvera to work. All Mr. Silvera did, instead of destroying them as he might have in the regular course, was to preserve them at my request.

The COURT. Dated them.

Mr. ROZEN. Dated them and preserved them for me. That is all was done. There was no preparation for this trial of any kind.

The COURT. I do not think there was anything unfair in the question.

Mr. ROZEN. But it puts Mr. Silvera under a burden, and it looks as if he was in cahoots with someone.

The COURT. I will let him go on.

By Mr. MERRITT:

Q. What else have you done to assist Mr. Rozen in connection with the presentation of this case?—A. Anything that he asked me I endeavored to answer as correctly as possible and get him the accurate information that I could, the information as accurate as possible, which the evidence must prove is accurate, I believe—I hope.

Q. And these reports or records which you kept at Mr. Rozen's request you turned over to Mr. Rozen?—A. That is right.

Q. And none of them are among these I show you [handing]?

Mr. REYMAN. You might tell him what you are showing him, Mr. Merritt.

Mr. MERRITT. Exhibits 6 to 14 I think they are.—A. Yes. These are some that I turned over to him.

Q. And prior to any conference with Mr. Rozen, you had not kept written records of what you were doing, is that correct?—A. I did keep certain papers that I thought might be of necessity to defend myself in the future due to the tactics with which I have been handled.

Q. By whom?—A. My superintendent.

Q. And that was one of the reasons you kept these records?—A. That is right.

Q. And this idea of putting these dates on these Exhibits 6 to 14 was——A. That is my own idea.

Q. And that started since you have talked to Mr. Rozen?—A. That is right.

Q. And you are quite sure you put them on at the time you received the directions from Mr. Ferdinand?—A. As nearly accurate as possible they are.

Q. And that is the most you can say in favor of them; that they are as nearly accurate as possible?—A. They are very accurate.

Q. Are they absolutely accurate?—A. They are.

Q. Did you put them on there the same day you received——

Mr. ROZEN. I don't see any necessity of badgering this witness. He has asked the question more than once.

The COURT. Now, let him alone. This is cross-examination.

Mr. ROZEN. Your Honor, with due deference, it approaches badgering the witness and I don't think we ought to stand for it.

The COURT. Oh, no.

Q. And these dates you put on at the request of Mr. Rozen?—A. Not Mr. Rozen's request. I put them on of my own volition, my own idea.

Q. And were each one put on the very day you received the instructions from Mr. Ferdinand?—A. Yes, sir.

Q. So you are absolutely sure that they are the right date, then?—A. Yes.

Q. And you are absolutely sure that you put that date on on the very day that you received instructions from Mr. Ferdinand, is that correct?—A. Yes, sir.

Mr. MERRITT. That is all.

Redirect examination by Mr. REYMAN:

Q. Are the exhibits just referred to by Mr. Merritt, Exhibits 6 to 14, the only instructions you ever received from Mr. Ferdinand with respect to your work?—A. Oh, no. Definitely not.

Q. Are they the only ones you ever dated?—A. They are.

Q. And the dating was done for your purposes?

Mr. MERRITT. He so stated.

The COURT. It is perfectly plain.

Mr. MERRITT. It was his own idea.

Mr. REYMAN. That is all.

JOSEPH USHELEVSKY, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. ROZEN:

Q. Where do you reside, Mr. Ushelevsky?—A. 3451 Giles Place, Bronx.

Q. What is your occupation, sir?—A. Business agent of the Joint Board Dressmakers' Union.

Q. Will you describe the nature——

The COURT. What did you say your business was?

The WITNESS. Business agent; representative of the Joint Board of the Dressmakers' Union.

Q. Will you describe the Joint Board of the Dressmakers' Union?—A. The Joint Board consists of four different locals, representative of four different locals, Local No. 10 consisting of cutters, all the cutters are members of Local No. 10.

Mr. MERRITT. Before we go any further, may we know the purpose of this evidence, because on the face of it it seems to me entirely irrelevant.

The COURT. What is the object of it?

Mr. ROZEN. In the first place I would like to qualify this witness, if your Honor will permit me. I want to show that this man, as a representative of the Joint Board, has direct supervision and control, for his union, of the place in 463 Seventh Avenue run by Max Wiesen & Sons, and I want to show that he was in the building and I offer to prove by this witness that at the time of the strike he knows the conditions that existed in the building. In addition to that I also have testimony, through him, with respect to the num-

ber of employees engaged in the industry, the same sort of evidence which your Honor ruled on yesterday, and the general effect——

The COURT. I ruled it out yesterday.

Mr ROZEN. Yes; your Honor.

The COURT. You made your tender there.

Mr. ROZEN. Yes; your Honor.

The COURT. I don't really see how, in the first place, it is relevant. I sustain myself on my ruling of yesterday.

Mr. ROZEN. I did not expect to develop that until the end, and at that time I wanted, if I may, to call your Honor's attention to the United States Supreme Court case of Borden's Co. v. Baldwin, 293 U. S. 194, where the New York State statute affecting the milk industry was involved. Chief Justice Hughes rendered the opinion and said this:

"We have had occasion to note that 'save the conduct of railroads, no business has been so verily regimented and regulated by the State of New York as the milk industry.'"

And of course your Honor knows the number of times that the milk industry came up for consideration in one phase or another in the Supreme Court, principally in the case of Nebbia v. New York——

The COURT. Yes.

Mr. ROZEN. Yet despite that fact the Supreme Court reversed the dismissal of the complaint which sought to enjoin the enforcement of the statute on the milk industry in that case and said very clearly that they wanted to have the facts developed so that they could give intelligent consideration to the questions before them.

One thing I failed to point out yesterday, your Honor——

The COURT. What is the title of that case?

Mr. ROZEN. Borden's Farm Products Co., Inc. v. Baldwin.

The COURT. Who was Baldwin?

Mr. ROZEN. I take it that he is an official of New York State. Yes, Commissioner of Agriculture and Markets of New York State; but the point I wanted to make was that the Supreme Court said it could not give intelligent consideration of the case without facts disclosing the situation, "And reference is made to the disturbed state of the trade, preceding the enactment of the Milk Control Law, and to the effect of the ban imposed by local ordinance upon the sale of 'loose' milk, which led to changes in methods of distribution and to price adjustments from time to time in order to meet competition.

"For the present purpose it is sufficient to say that these arguments are addressed to particular trade conditions in the

City of New York, which largely lie outside the range of judicial notice."

And in sending the case back the Court asked directly that consideration be given to the trade conditions in the City of New York.

Now, your Honor, one thing I failed to point out yesterday, and I think it may make a difference in your Honor's decision on the question, and that was that a defense in this case is the constitutionality of the Act.

The COURT. No; it is not.

Mr. ROZEN. Yes, your Honor; it is.

The COURT. No; it is not. It is whether, being an admittedly constitutional act in its proper zone, these employees are within the ambit of this Act.

Mr. ROZEN. No; the defense goes further than that. Right on its face it says the Act is unconstitutional as applied to these defendants and as applied to their employees.

The COURT. It is contingent. If applied.

Mr. ROZEN. Yes; they say, if applied to them, the Act is unconstitutional. Now that, it seems to me, is a direct challenge to the constitutionality of the Act.

The COURT. Have you notified the Attorney General?

Mr. ROZEN. We do not have to, your Honor, because the United States is a party.

The COURT. You are supposed to be the United States, are you?

Mr. ROZEN. Yes, sir; or an officer or agency. The rules clearly provide for that. Would your Honor like me to read it to you?

The COURT. All right. I was wondering if there was any constitutionality question why you had not notified the Attorney General. Of course this is all outside of the ordinary rules, to have anybody except the Attorney General or the United States Attorney representing the United States, and also it is outside of the ordinary rules not to have the Attorney General advised. I know he has to be advised when there is a question of constitutionality.

Mr. ROZEN. It is rule 24 (c) of the Federal Rules which I will be glad to read to you:

"When the constitutionality of an Act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in the Act."

Local Rule 11 incorporates the same thing.

The COURT. You do not have to notify the Attorney General because you are an employee of the United States, isn't that what it says?

Mr. ROZEN. That is one of the things; officer, agency or employee. We are at least an agency, your Honor.

The COURT. All right. Then you don't have to notify the Attorney General.

Mr. ROZEN. Yes, your Honor. But that question has been raised in the answer, and your Honor is aware that when the constitutionality of an act is questioned, as it is in this case, in my opinion, it takes it out of the ordinary scope of the ordinary case where you try to find out whether A owes B money or whether A comes under the coverage of this or that, but you have here broad general questions raised, and this answer raises them.

The COURT. They are all foreclosed by the decisions of the Supreme Court. The only thing is whether these people are within the ambit of this Act. That is all I have to decide and that is all Judge Kirkpatrick decided.

Mr. ROZEN. Yes, your Honor. Well, he decided the constitutionality on that Darby decision.

The COURT. I have to follow the Darby decision, too, but I can use my intelligence and determine whether the Darby decision covers these people, and that is quite a different thing.

Mr. ROZEN. I am glad to hear your Honor's view on that, of course. I think in view of those facts, your Honor, this economic data should be admitted into the record.

Mr. MERRITT. I object to it.

The COURT. I cannot see any relevancy at all. I think we have all that we need without having that come in. I don't see what good it is myself.

Mr. ROZEN. Your Honor, I will try to confine my questions. I take it my offer of proof has been ruled on, and your Honor adheres to the decision you made yesterday.

The COURT. Yes.

Mr. ROZEN. I will try to confine my questions, if I can, to questions relating to this building and not to economic data, so-called.

The COURT. Yes.

Mr. ROZEN. The questions I shall ask this witness first are to qualify him and show his connection and how he came to be in the building and how he comes to supervise——

The COURT. I have not heard any questions that, as you call it, qualify him. He says he is a business agent of the Joint Board of Dressmakers' Union, and then he began describing what that was.

Mr. ROZEN. Yes, your Honor. May I continue?

The COURT. Yes.

Q. Will you go on, Mr. Ushelevsky, please.—A. I believe I mentioned Local 10 consists of all cutters in this industry.

Mr. MERRITT. May I make a suggestion. As I understand, he is just leading up to asking this witness some questions as to the conditions in this building during the strike. Isn't that it?

Mr. ROZEN. Under his Honor's ruling that is all I can do.

Mr. MERRITT. Then you do not need to qualify him, if he was there and saw those things.

The COURT. Did he see them?

Mr. ROZEN. These are merely preliminary questions.

Mr. MERRITT. It is not necessary.

The COURT. He is not an expert. He is a fact witness.

Mr. ROZEN. That is right, your Honor, but I want to show how he came to have these observations.

The COURT. That is entirely immaterial; what his life history is, or anything like that. "Were you there?" "I was." "If you were there, what did you see?" That is all you have to ask him. He is just a fact witness.

Q. Were you there at the building, Mr. Ushelevsky, during the strike?—A. Yes, sir.

The COURT. On what days was this?

The WITNESS. That is at the time when the elevator strike took place.

The COURT. What date was that?

The WITNESS. That was in February, the 1st, 2nd, and 3rd. I believe it lasted three days or so.

Q. What did you observe, Mr. Ushelevsky?—A. At the time when I reached the building I found that all of the workers, at least of Max Wiesen's shop, that I am the business agent of, I found them in the hallway. They were all standing in the hall and could not go up.

The COURT. You mean the lower floor?

The WITNESS. Downstairs in the main lobby of the building.

By the COURT:

Q. They did not go upstairs? Did you count them?—A. No; I could not possibly count them. It would take me hours.

Q. To count to seven hundred?

Mr. ROZEN. He said Max Wiesen's employees, about six hundred.

The WITNESS. I am mentioning the fact that these people, this shop employs about six hundred workers members of this union.

Q. Is that only of the Local 10?—A. No; they are members of the Joint Board and that includes all the members of the Joint Board of the different locals. We have four locals, 10, 22, 89, and 60.

Q. What are these different people, what do they do?—A. Local 22 are all the operators of all nationalities; operators, finishers, cleaners, examiners, and drapers of all different nationalities outside of Italians.

Q. You exclude Italians?—A. No; we don't exclude, if your Honor will permit, I will explain how it is adjusted.

Q. Well, go on.—A. Local 89 is all the members of the Italians, all Italian operators, finishers, pressers, cleaners, drapers.

Q. What is 60?—A. Local 60 are all the pressers of all nationalities.

Q. Is 89 a solid Italian local?—A. Yes.

Q. Exclusively Italian?—A. Exclusively Italian.

Q. And these four locals make up——A: The Joint Board.

Q. The Joint Board of the Dressmakers' Union that you represent as business agent?—A. That is right.

Q. And you went down there and you saw them downstairs, did you, in the lower part of the building?—A. That is right.

Q. In the ground floor?—A. In the main lobby.

Q. And they were not going up?—A. No; they were not. They did not go up.

Q. Do you know whether any of them went up?—A. I can speak for all these members of the union that are members of the union, they did not pass the picket line.

Q. So your men did not go up?—A. No; not our men.

Q. Did you go up?—A. No; your Honor. I wanted to instruct the workers not to pass the picket line, and certainly I myself would not pass the picket line and go up in a scab elevator.

The COURT. I don't think we need to go into this any more. I don't see anything in it at all. We all know that the work came to a slowdown. That was shown by the American Railway Express Agency, and I don't think that there is any earthly reason for going into this any more. People in a tall building cannot climb many floors. It would kill a great many people who tried it. It simply is impossible for them to do it. I don't see any need in going into it at all.

Mr. ROZEN. Very good, your Honor.

You may inquire, Mr. Merritt.

Mr. MERRITT. In view of his Honor's remark, I do not think I will cross-examine.

Mr. ROZEN. Your Honor, I have a few other witnesses here whose testimony would be of the general nature of the dress business in the Garment Center and the manner in which it operates generally, the extent of it, the size of it, and general statistics. I have three witnesses, Mr. Neufeld, Mr. Loebl, and Mr. Wall. Mr. Wall, I might add, testified in the Kirschbaum case before Judge Kirkpatrick, and his testimony is set forth at length in the record which I have here.

The COURT. What are they going to prove? I don't understand.

Mr. ROZEN. Well, your Honor, apparently Judge Kirkpatrick felt, although counsel for the defense objected, that he would like to hear, or at least suffer to come into the record, the facts with respect to the garment industry in New York City. Although he was in Philadelphia he felt the situation in New York City was sufficiently interesting, or of interest or significance, or relatively important enough, to listen to, and as I say, Mr. Wall's testimony is given at length in the record.

The COURT. How does he differ from Dr. Teper?

Mr. ROZEN. A little different situation, your Honor. Substantially their testimony is similar; one complements the other. Dr. Teper was a member of the union, I. L. G. W. U., International Ladies Garment Workers Union, which has most of its employees here in New York City, and Mr. Wall, for example, is a member of the association of employers' firms which employ these employees, and through him we were able to develop very interesting and relevant material sidelights upon the dress industry in New York City, so as to show your Honor the extent of the commerce and show your Honor the reliance placed by these firms, members of Mr. Wall's association, upon maintenance employees and the manner in which they work, and the manner in which a strike of maintenance employees directly ties up their production and directly ties up interstate commerce.

The COURT. You do not need to do all those things because the evidence is already in. It is perfectly obvious.

Mr. ROZEN. Yes, your Honor; but as I said yesterday as to the economic data I would like to make a proffer of it.

The COURT. All right. Make a proffer of it. If you do it in a formal way you can make a proffer of it. I don't see what that has to do with the case. I think we have all the evidence that we need to show that these tenants were in interstate commerce and under the rulings of the Supreme Court a strike of the maintenance employees would interfere

with interstate commerce. So would a strike of the Consolidated Edison Company if the electricity was turned off.

Mr. ROZEN. Mr. Loebl would testify to the direct effect of the strike upon his business which is that of a consolidation of packing or shipping or forwarding concern. We have the figures here setting forth the day to day shipments.

The COURT. Of these three days.

Mr. ROZEN. Yes, your Honor; and a few days before and a few days after. In Mr. Nebel's testimony he testified with respect to the Railway Express.

The COURT. I think that is all right.

Mr. MERRITT. This is not in regard to this building, but offering it in regard to the industry as a whole, and I object to that.

The COURT. Oh, yes; I think if it is outside this building you do not need to do it.

Mr. ROZEN. As a matter of fact, your Honor, though I do not like to belabor the point, in the case of Fleming against Kirschbaum——

The COURT. I have heard a great deal about that.

Mr. ROZEN. In that case Mr. Nebel testified, and all he furnished Judge Kirkpatrick in that case were the general statistics of the flow, pick-up, and delivery count in New York City in his division. Not with respect to any one building, but just within division No. 3 that Mr. Nebel is supervisor of. I have the same testimony here from Mr. Nebel but also from Mr. Loebl.

The COURT. We have had that from Mr. Nebel.

Mr. ROZEN. Yes; but the testimony Mr. Loebl gives is the same testimony Mr. Nebel gave.

The COURT. Only of broader scope.

Mr. ROZEN. It is the same testimony Mr. Nebel gave in the Kirschbaum case.

The COURT. What is Mr. Loebl's position; what is he?

Mr. ROZEN. President of the National Packing Company, which consolidates shipments from various dress manufacturers, destined for out-of-town jobbers, department stores, and specialty stores. I want to show how many employees they have. A buyer comes into town and goes around to various dress houses and orders goods——

The COURT. Has he any evidence to give about this particular building?

Mr. ROZEN. I don't know, your Honor. I have not prepared him on that. Perhaps he has. May we call him and ask him?

The COURT. You can ask him that if you want to.

Mr. MERRITT. Will you take the recess, and let him see him during the recess?

Mr. ROZEN. Let us swear him. He is here now. I would like to dismiss him as soon as I can; he is a very busy man.

The COURT. Yes; go on.

ANDREW W. LOEBL, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. ROZEN:

Mr. ROZEN. Your Honor, I understand that you will not permit me to ask him general questions.

The COURT. No; I won't. I want to see if you can get any evidence about this particular building. Perhaps he has not any, I don't know.

Mr. ROZEN. Very good. I do not know, either, your Honor.

Q. Can you answer that question for us, Mr. Loebl?

The COURT. What is your position, in the first place, Mr. Loebl?

The WITNESS. President of the National New York Packing & Shipping Company.

The COURT. What is its business?

The WITNESS. We are in the business of consolidating and expediting shipments out of New York and the Metropolitan District generally.

The COURT. Into other states?

The WITNESS. Into other states.

The COURT. Have you any information as to the effect upon this particular building, the Arsenal Building, of the strike that occurred on February 1st and 2nd, 1939? Perhaps February 3rd is included also; I don't know.

Mr. ROZEN. Yes, your Honor.

The COURT. The first three days of February, 1939. About that particular building.

The WITNESS. As to the particular building, no, sir.

The COURT. But your testimony would be just general testimony?

The WITNESS. Yes.

The COURT. About the effect of the strike on the trade in general?

The WITNESS. On the volume of packages passing through our hands.

The COURT. Yes; that is general. I am against it. I may be wrong but I am against it.

Mr. ROZEN. Very good, your Honor.

The COURT. I will excuse you. Do you want to ask him anything further? He can go. So that frees you.

Mr. ROZEN. Yes; we do not need you any further, Mr. Loebl.

(Recess to 2:30 p. m.)

AFTERNOON SESSION

ABRAHAM SCHENKER, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Miss COTTRELL:

Q. Where do you live Mr. Schenker?—A. 2290 Davidson Avenue, Bronx.

Q. Where are you employed?—A. Major Trucking Company, 463 Seventh Avenue.

Q. How long have they been located at 463 Seventh Avenue?—A. I believe it is since October 1938.

Q. What is your work?—A. I am foreman.

Q. What type of work does the Major Trucking Company do?—A. Trucking for the Garment Center trade.

Q. Where are the packages ultimately sent which you handle?—A. To the various packing houses, railroad deliveries, and chain-store outfits.

Q. Where are your deliveries made?—A. I do not understand.

Q. Where do you take the packages which you receive?

The COURT. Where do you get your receipts?—A. To the various packing houses.

Q. Where are they located?—A. The packing houses?

Q. Yes.—A. On 35th Street, 36th Street, 37th Street, 38th Street, and 39th Street, west of Eighth Avenue.

Q. In New York City?—A. In New York City.

Q. What is the ultimate destination of those packages?—A. Well, the majority of them are marked for the Middle West, Western States, and South; out of New York.

The COURT. Addressed to other states.

The WITNESS. That is right.

Q. How can you tell that?—A. Well, we assort the packages to the various packing houses and by that we look at the names, where they are going to.

Q. And the address appears on the packages?—A. That is right.

Q. Do you deliver packages or just pick them up?—A. We pick up packages and deliver them to their different markings. The package may be marked out of the state but it

goes through a buying office or packing house in New York City.

The COURT. I don't think you know exactly what she was asking. As I understand it, you wanted to find out whether he not only took things away from the Arsenal Building but whether he brought things to the Arsenal Building.

Miss COTTRELL. That is quite right.

The WITNESS. Not to the Arsenal Building directly. We bring it to our premises from our other office or from the various other places that we pick up packages from.

The COURT. Don't you do any deliveries to the Arsenal Building?

Miss COTTRELL. To the tenants in the building.

The WITNESS. The only place we would have that was when a package or rack of dresses is refused and we bring it back to the tenant in the building.

The COURT. Primarily your business is pick-ups.

The WITNESS. Picking up and delivery.

Q. Delivery to the packing houses?—A. Delivery to the packing houses.

Q. Would you describe in what manner you pick up the packages from tenants in the Arsenal Building?—A. To a few we have direct phones. When they call us up, they send a boy down to bring down whatever it is, loose garments or packages, and take them to their destination.

Q. You spoke of another office in the city. Where do you collect all your racks and packages before bringing them to the packing houses and delivery houses in New York?—A. There are probably 25 buildings in the vicinity that we go into and we take them all to our premises, assort them, and load them onto our motor vehicles and then send them out.

The COURT. Are your premises in the Arsenal Building?

The WITNESS. Well, on the ground floor of the Arsenal Building, yes.

Q. I show you Defendant's Exhibit A, and ask you to indicate where your premises are?

The COURT. You had better mark it "A–S."—A. (Witness complies.)

The COURT. The witness has marked "A–S" in a red square, indicating his premises.

Do you lease those premises from the Arsenal Building?

The WITNESS. Well, as far as leases are concerned, I would not know about that.

Q. Where do you bring the garments which you pick up from your 25 buildings in the vicinity? Do you bring those into the building?—A. Not all of them. Some of them. If

we have direct deliveries, where a rack does not have to be split up, it goes direct to its destination. If it goes anywhere from, we will say, 30th Street downtown, we bring it into the building where it is assorted with similar deliveries and then put on the motor vehicle and sent out.

The COURT. Do you have spare racks in your equipment?

The WITNESS. That is right.

The COURT. So you can split them up?

The WITNESS. That is right.

Q. Where do you keep those racks before you load them on the trucks, at the Arsenal Building?—A. We keep some in our premises and some of them outside of the premises.

Q. Where are they kept outside of the premises?—A. Well, we keep some racks in the hallway but they are continuously going in and out.

The COURT. The hallways outside of your——

The WITNESS. The hallway outside of the freight hall.

Q. That you designated as the freight hallway?—A. That is the freight hallway.

Q. Do any of the employees of the Major Trucking Company keep the freight hallway clean?—A. Well, we have a lot of complaint about keeping our racks in the hall. The superintendent comes down, and I believe Mr. Spear was down himself a few times, telling us——

Q. Was that recently?—A. It is as far back I imagine as two weeks ago, three weeks ago perhaps. Mr. Ferdinand came down and told us to keep the hall in better shape than we are.

Q. But as far as cleaning public hallways goes, even though you use it, none of your employees clean it?—A. I tell you, we would not have any waste there at all; because all we have is a cloth cover over a rack and garments. You see there is absolutely no dirt at all that we would——

Q. Would it be possible to get all the racks which you handle into your own premises?—A. Yes.

Q. But as I understand it you do not operate the business that way, you use the hallway to keep the racks?—A. Part of the time, during the day.

Q. Prior to loading them on trucks?—A. While we are sorting them prior to sending them out on trucks.

Q. Do you recall the building maintenance strike in February 1939?—A. I do.

Q. Were you at the Arsenal Building at the time of the strike?—A. I was.

Q. Could you tell the Court what effect the strike had on your business?—A. Well, it slowed us down a little. People

who wanted to ship either brought it down or we sent our boys up to the lower floors to bring them down.

Q. Do you recall several weeks ago when I spoke to you at the Arsenal Building?—A. Yes; I do.

Q. At the office. And that I asked you similar questions that time?—A. I don't recall the questions you asked me at the time.

Q. At that time you said that——

Mr. MERRITT. Just a moment, please. I would have to object to what he said to you at that time.

The COURT. Yes.

Miss COTTRELL. I was refreshing the witness' recollection, your Honor.

The COURT. Have you anything you want to give him to refresh his recollection?

Mr. MERRITT. I think the idea is to refresh his recollection as to something he said to her in a pre-trial conference he had with her. I do not think that is proper.

The COURT. I should not think that would be good. Anything could refresh his recollection, a pencil he may look at, or anything.

Mr. MERRITT. Yes; I suppose your Honor is right.

The COURT. Of course, it does not make any difference what he may have said to you or you said to him.

Miss COTTRELL. It is not important, your Honor.

The COURT. How far up did you send a man during the strike?

The WITNESS. Oh, as far as about the tenth floor.

Mr. MERRITT. We produce this as the lease. You may offer it in evidence if you want to (handing to Miss Cottrell).

Miss COTTRELL. We would like to offer in evidence the lease of the Major Trucking Company. (Marked "Plaintiff's Exhibit No. 53.")

Miss COTTRELL. That will be all.

Cross-examination by Mr. MERRITT:

Q. Is your company the only trucking company which occupies space in the Arsenal Building?—A. No; there is another trucking concern that does.

The COURT. What is the name of that?

Q. I mean that has rented space and quarters there.—A. That I would not know.

Q. Do you know of any other trucking company?—A. No; I do not.

The COURT. He says one of them occupies space in the building.

Mr. MERRITT. Yes; I think he has corrected that now, as I understand it.

Q. Let us find out what the facts are.—A. I think we are the only ones rent space in the Arsenal Building.

Mr. MERRITT. That is all.

Mr. REYMAN. We will include this lease among the ones to be photostated.

Your Honor, we have here a certified copy of certain original data on strikes of elevator and maintenance employees, from 1927 to 1939, by location and major issues, on file in the Bureau of Labor Statistics in the United States Department of Labor, certified under the seal of the department.

The COURT. It is competent if it is relevant and material.

Mr. REYMAN. We offer it in evidence at this time.

Mr. MERRITT. I object to it as irrelevant and immaterial.

The COURT. Let me take a look at it. I cannot imagine it is, though it is perfectly competent, under the seal of the Department.

(Mr. Reyman hands paper to Court.)

The COURT. I think I will sustain the objection to this. It goes all around, all over the country, Boston to Tulsa, Oklahoma.

Mr. REYMAN. That is right. It is a matter of public record. It is data compiled by an official department of the Government, which we feel might be relevant with respect to the effect of strikes on commerce.

The COURT. I do not think it is relevant in a case of this kind.

Mr. REYMAN. I understand.

The COURT. I do not think it is relevant in any way. So I sustain the objection.

Mr. REYMAN. The plaintiff rests.

DEFENDANTS' CASE

LEON R. SPEAR, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. MERRITT:

Mr. MERRITT. Perhaps I should make the formal motion of dismissal before I put on my witness.

The COURT. I make it almost a standing rule never to dismiss any of these nonjury cases on the plaintiff's case. In the old time the rule used to be that you had to rest in an equity or admiralty case before you could make a motion to dismiss. In other words, you just took your luck as it came.

I remember once being in that situation before Judge Hough, who was a formidable judge. I made a motion to dismiss without resting, and that is what I attribute the loss of my hair to. At any rate he said you always had to do it. Nowadays I think the rule is changed and under the new rule you do not have to rest. I believe that we have to see the whole thing in these cases, everything you regard as relevant. So I will let you go on and deny your motion pro tempore at least. When you finally submit the case of course you can argue it, each side moving for judgment.

Q. What position do you hold in connection with Spear & Company?—A. Vice president.

Q. Do you act for that company in connection with the management of the Arsenal Building?—A. Yes, sir.

Q. Will you state whether or not during the last ten years there have always been some vacancies in the building?—A. Yes, sir; we always had some vacancies.

Q. Will you state whether or not it is part of the duties of the building service employees, as to the vacant premises, to look after the care of the vacant premises?—A. Yes.

The COURT. To look after what?

Mr. MERRITT. The care of the vacant premises.

The COURT. You mean care for them?

Mr. MERRITT. Yes.

The WITNESS. Well, the minute a place becomes vacant we clean it up, paint it and make it presentable for any prospective tenant.

Q. Will you state to what extent it is customary for the building to make special arrangements with tenants for the renovation or alteration of rented premises at the time of entering into a lease or at the time of the renewal of a lease?—A. With very few exceptions, every new lease or renewal of that lease will entail some agreement of either construction or changing around, as a consideration for making the renewal.

Q. Will you state in a general way what is the percentage of labor cost of operating the Arsenal Building as compared with the total cost of maintaining, operating, and owning the building?—A. By total cost of owning, you mean all the operating costs, including the interest on the mortgage, and so forth?

Q. Yes; and taxes.—A. It varies and runs between sixteen and twenty percent.

The COURT. That is the labor cost?

The WITNESS. That is the labor cost; and the reason is there is a variation, because in some years the tax rates

change or the assessments increase or because of the terms of the mortgage. The mortgage will begin at 5 percent and go from 5½ to 6 percent. This is a mortgage that was made originally a 15-year mortgage.

The COURT. It varies from 16 to 20 percent?

The WITNESS. Yes.

Cross-examination by Mr. REYMAN:

Q. With respect to renovations, Mr. Spear, I think you said it is customary to renovate the tenants' space at the expiration of a current lease and at the beginning of the renewal of a lease?—A. Yes; with few exceptions. There are some agreements where we have to agree to do something in order to make the renewal.

Q. Are the terms of the leases for the several tenants uniform with respect to time of making and time of expiration?—A. The time of expiration, that is, the month or day of the month is all the same. They all end on January 31st. The time of negotiation will vary from June to January 26th of a given year.

Q. So that the renovations made would not all be made at one time. It would extend over a period of time?—A. Yes.

Q. Probably several weeks?—A. Yes; and in some years it is much greater than other years.

Q. What would be the length of time after February 1st?—A. Sometimes we will go over a period of six months because you must remember that depending on when we are ready to make the alterations or renovations we have to get the permission of the tenants.

Q. You consult the tenants' desires and you try to work it in?—A. Exactly. There are some months in the year we could not do anything in there. We could not even go into the premises. They are busy and just not interested, and you must remember this is a very seasonable business.

Q. So the renovating and knocking down of the walls is connected with enlarging or changing space?—A. Yes, but by experience you will find most of our knocking down and rearranging as well is around February 1st, around that period.

Q. And usually for new tenants?—A. And also old tenants. We have some shifts, where we shift them on February 1st; that is the shifting period.

Q. But the point I am trying to make is this: the period is not one certain period in a year; that is, it extends over the period of time so that the porters or men who do the

work are working rather steadily for some time?—A. Not in connection with changing of walls.

Q. No; but I am talking about the cleaning and the painting. I think they do the painting?—A. No; our porters do not do the painting.

Q. What do they do?—A. The only painting our porters will do is when a loft has been vacated and it is offered for rent, we will paint just the floor. The walls and the ceilings and anything that has to do with the loft itself is contracted for by a painting contractor. Our men will sometimes paint the floor. In other words, they mop it up and we use this battleship gray paint on the floor so it sparkles and looks like a brand new suite.

Q. After the painting is done, is it your men who clean the windows and do the general cleaning up?—A. No; our men have absolutely nothing to do with windows. In places that are occupied it is done by contracting companies whom the tenants employ and in case of vacant floors it is done by contracting window cleaners whom we employ.

Q. So they do just the janitor work and do not do the special work with regard to painting and renovating and that sort of thing?—A. That is right.

Q. How long have you been in the real estate business or the rental business?—A. I am starting my 29th year.

Q. So you must be fairly familiar with comparative labor costs in buildings of this type? That is, you testified that your labor costs run 16 to 20 percent of the total cost?—A. That is right.

The COURT. That is the total running expenses of the building.

Mr. REYMAN. Yes; that is my understanding.

The WITNESS. Yes; the proportion that labor costs have to the over-all costs.

The COURT. Yes.

The WITNESS. Which includes taxes and interest on the mortgage and that sort of costs.

Q. Leaving out interest on the mortgage, what would be the——A. Then your percentage would go up to 35 or 40 percent.

Q. And the 35 or 40 percent mark, would that be about the average for similar types of buildings in the garment industry?—A. It is about an average for loft buildings.

The COURT. You mean that either way; with or without the mortgage.

The WITNESS. Well, the labor cost in comparison to what we call the over-all cost of operation, as I say, usually that is

between the 16 to 20 percent mark. In other words, if you had a $50,000 pay roll, that would represent either 16 or 20 percent of that total cost.

Q. So that the number of employees you have in your building, I would assume, would be about average for a similar-sized building in that location?—A. Well, that is a question that I cannot answer because we do not manage the other buildings. I do not know how they operate.

Q. Yours is a well-kept building?—A. It is supposed to be.

The COURT. That is one of the biggest of its kind.

The WITNESS. It used to be but it is not any longer. There are much bigger buildings in that district now. They have them 44 stories high.

Mr. REYMAN. That is all.

Mr. MERRITT. That is all, Mr. Spear.

Mr. MERRITT. Defendant rests.

Mr. REYMAN. No rebuttal, your Honor.

The COURT. Then the case is closed. What is your pleasure about argument?

Mr. MERRITT. I am prepared to proceed at once after the plaintiffs have presented their contentions.

Mr. REYMAN. As for me, your Honor, I would prefer, and suggest, that the argument be had tomorrow. I would like to have the benefit of a perusal of the record we have made so far, and I would like to look at the exhibits. Some of them have recently gone in and I think it would be more beneficial to the Court, so far as my argument is concerned, if we did have the rest of the afternoon.

The COURT. I do not think you have to have such an awfully long argument of this case. This is not a case which involves facts. It is a case where you have to sit down together and explore the law.

Mr. REYMAN. I will start, if your Honor desires, but I want to point out one other thing. You suggested preparation of findings of fact.

The COURT. I was going to say that I thought perhaps if you could each of you have some findings of fact, which apparently was the way Judge Kirkpatrick did it, why it might give you a little leeway to get ready if we adjourned until tomorrow. I will not take any more briefs at all.

Mr. REYMAN. That was my understanding.

The COURT. I do not know that I can decide it off the bench. I never can tell until after I am through with the argument, but it is mainly a question of law, it seems to me. At least I do not think there are any disputed questions of fact that

I can think of now. I should think perhaps on the whole the most satisfactory way of doing it would be to give you a start this afternoon, say argue for an hour. Suppose we sit until four and you can see if you cannot finish by that time. I do not know. I do not see how you can preach a very long sermon.

Mr. REYMAN. I doubt that I can.

The COURT. I really would prefer on the whole, on account of some engagements I have, with an opinion in a three-judge court, and it might be better all around to have the argument tomorrow.

Mr. MERRITT. That is entirely satisfactory to me.

The COURT. Suppose we do that and we will adjourn now until tomorrow at eleven o'clock.

(Discussion off the record.)

(Adjourned until April 4, 1941, at 11:00 a. m.)

APPENDIX

NEW YORK, *April 4, 1941, 11: 00 o'clock, a. m.*

TRIAL RESUMED

Mr. REYMAN. May I hand up our proposed findings of fact, your Honor. [Hands to the Court.]

The COURT. Yes; that is what I want.

Mr. REYMAN. We understood that your Honor wanted the paging with respect to each separate finding on a separate document, and it is in preparation. I hope it won't inconvenience the argument.

The COURT. Oh, no.

Mr. REYMAN. We will supply it to you in a very short time.

The COURT. Did you get out any findings of fact? Were you able to?

Mr. MERRITT. They are here.

The COURT. There is no hurry about them, because we will have to have a lot of argument first.

Mr. MERRITT. I am afraid the citations are a little bit cursory. Of course, on general conclusions of fact citations serve no particular purpose.

The COURT. You have to have general ones.

Mr. MERRITT. Yes.

ORAL ARGUMENT ON BEHALF OF PLAINTIFF

Mr. REYMAN. If the Court please, we have endeavored to present facts to your Honor to justfy an order of injunction

against the defendants restraining future violations of Section 7 of the Fair Labor Standards Act. Section 7 only is involved here, except as the violations, which we contend they are, are forbidden by Section 15(a)(2) of the Act.

The COURT. Section 7 is just on the question of hours.

Mr. REYMAN. That is it. Whether or not overtime at least one and one-half times the regular hourly rate of pay shall be paid for hours worked over 40 during a workweek. That is the only question. There is no question of minimum wage violations. It narrows down to the one overtime question.

The COURT. I understand it. Just how does that come up, if you will remind me?

Mr. REYMAN. The employees involved, as your Honor knows, are paid a weekly amount according to their several occupations for 46 hours, for all except watchmen. Watchmen are paid a specified amount for 58 hours, I believe, for the workweek.

The COURT. Then you can say by and large at least that all employees but watchmen—which is the way I recollect it—have a 46-hour workweek.

Mr. REYMAN. Yes, sir.

The COURT. And watchmen have 58.

Mr. REYMAN. The watchmen have a 58-hour workweek.

The COURT. That means under the status which the Act has now reached that you have six hours' overtime for all employees.

Mr. REYMAN. For all employees.

The COURT. Other than watchmen.

Mr. REYMAN. Other than watchmen.

The COURT. And the watchmen would have 18 hours' overtime.

Mr. REYMAN. 18 hours' overtime, and the rate of pay for those overtime hours would be computed at one and one-half times the regular hourly rate. In other words, the statute contemplates payment by the hour. It also contemplates a workweek.

Section 6 of the statute requires that every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates:

1. During the first year from the effective date of this section not less than 25 cents an hour.

The effective date of the section was October 24, 1938, although the Act was approved in June. So from October 24,

1938, to October 24, 1939, the minimum rate required for such employees was 25 cents. Then the change-over occurred.

The COURT. It stepped up by degrees?

Mr. REYMAN. Yes; to 30 cents.

The COURT. Then it stepped up again?

Mr. REYMAN. No, sir.

The COURT. It has not?

Mr. REYMAN. No; the minimum now is 30 cents, and will remain at 30 cents unless changed by applicable wage order, until seven years after October 24, 1938, which is 1945.

The COURT. It is now 30 cents an hour, and unless changed remains that for seven years, to 1945.

Mr. REYMAN. To 1945; yes, sir. That is with respect to the minimum wage provisions.

Now with respect to the overtime provisions with which we are primarily concerned here, during the first year, that is from October 24, 1938, and one year following that, 44 hours was permitted for such employees at straight rates without payment of overtime. For the next year 42 hours was permitted, but now at this time 40 hours, the objective of the statute, has been reached.

The COURT. That is on the hour basis?

Mr. REYMAN. Yes; your Honor asked me that the other day. The hour objective of the Congress has been reached with respect to that figure of 40 hours per workweek at straight time; hours over that time, time and a half.

The COURT. Of course we are not interested in previous things. It is just a question whether they shall be bound to that in the future.

Mr. REYMAN. That is true; yes, sir.

The COURT. In other words, it is an injunction saying they must not do something. You will have to go into detail.

Mr. REYMAN. The admission of the amended answer, which we will refer to I suppose from time to time as the answer, and the admission read into the record the other day, show that defendants are not conforming to the statute with respect to the payment of overtime. In other words they say, we are not violating because the statute does not reach the employees, or, I suppose, the employer. So the question presented, as I see it, to your Honor, is whether or not the employees here in question are covered by the Act.

You will note in the brief we filed before trial that we say elevator operators, among the classifications, we consider are in commerce. Our next point that we make is that all of the employees of the defendants are engaged in the production of goods for commerce. "Commerce" is defined in the

Act, "employer" is defined in the Act, and "produced" is defined. Before going on to that and looking at the provision of Section 7, your Honor will note that it is provided that no employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce, for a workweek longer than 44, and so on.

So that Section 7 contains the express clause, "who is engaged in commerce or in the production of goods for commerce."

The COURT. That is the same clause they used all through, isn't it?

Mr. REYMAN. Yes. It is, except that under Section 3(j) of the Act "produced" is defined, and the words used by Section 7 are explained and defined in Section 3(j): "produced" means "produced, manufactured, mined, handled, or in any other manner worked on in any state; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods for commerce." Those are the words used in Section 7: "in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State," and of course it is under the clause "or in any process or occupation necessary to the production thereof in any State" that we say the obligations of the statute attach here, and the employer must pay these employees in question overtime rates of pay for hours aft forty. They should pay them now and should pay that in the future.

The COURT. Then of course in Section 13 you have a provision that any employees engaged in a retail or service establishment, and selling or servicing, is considered intrastate commerce, and I imagine that Judge Kirkpatrick took the position that in his case, which was apparently quite similar to ours, it was not a service establishment.

Mr. REYMAN. That is true.

The COURT. What is a service establishment? I thought that was the weakest link in his opinion really, but perhaps I did not quite understand why it was not a service establishment.

Mr. REYMAN. Let me look at the Kirschbaum case for a moment and compare it to ours. Here the exemption is not specifically claimed, as an excuse for nonpayment. I want to make that point first. Secondly, what is a retail or service establishment?

The COURT. You mean that was not pleaded?

Mr. REYMAN. No; it was not pleaded in this case and the defense was not raised.

The COURT. I do not think that makes any difference. I will let them amend if they want to plead it, if you think they have to plead it. I should not think that makes much difference, but we are trying to find out whether it is applicable here after reading the whole Act.

Mr. REYMAN. As long as your Honor has raised the question, I would like to read to you what the Administrator has to say. Now, your Honor knows that the Administrator in the interpretation of the statute, as a guide both to him and to others in its enforcement, has stated what he believes the law to be.

The COURT. Of course that does not mean very much. It is not like an administrative ruling. It is really, in effect, a rather solemn self-serving declaration.

Mr. REYMAN. It is very solemn but it is not always self-serving, however.

The COURT. Maybe not.

Mr. REYMAN. We do not go to the limits that I sometimes think your Honor thinks we try to. We do not go that far.

The COURT. I am not challenging the honesty of it, and after all if a person asserts what his jurisdiction is to a certain extent, or what his powers are to a certain extent, I think it could fairly be said to be a self-serving declaration.

Mr. REYMAN. It is at least a statement of his position. You will recall in the American Trucking Association case, and also in the Darby case, the Supreme Court referred with approval to the interpretative bulletins.

The COURT. Of course one might approve of something he said; but as to its juridical status, that would not make any difference. I do not know, but I suppose if those things have to be allowed in the case——

Mr. REYMAN. The Administrator was the first to say that the final determination as to the meaning of this statute rests with the courts, so that the statements are a statement of his position.

The COURT. Like an argument?

Mr. REYMAN. That is very true, and yet a good many people depend upon them as an authoritative statement of the law. I am not urging that to your Honor, but I am just stating that as a fact. I am not trying to persuade you by that statement, of course.

Now Section 13 of course specifically states exemptions from the application of the Act. That is the exemption section. So that when the exemption for service and retail establish-

ments is made, it means that employees of those establishments are outside of the coverage of the Act. So with the outside salesmen, another exemption; and agricultural employees, another exemption. They are specific exemptions as we pointed out to your Honor; exemptions made as to establishments or occupations, and the exemptions are specific. This enterprise, you might say, with which we are concerned, is not a service or retail establishment in any sense of the word, we believe.

The COURT. It is not a retail establishment. I am wondering whether it would not be a service establishment. I do not know, and that is what I want to talk over and explore.

Mr. REYMAN. Service establishments are service stations; they are barbershops, laundries, and undertakers' parlors, all set up to render some special kind of service. They are not connected with the production of goods for commerce. They may be in the stream of commerce just as the barbershop where the salesmen might go. We have said that service establishments may be considered to include generally that large miscellaneous assortment of business enterprises which are similar to retail establishment in character but which may not be accurately classified as such. I was just reading from the interpretative bulletin.

The COURT. It is annexed to your brief.

Mr. REYMAN. No; not this one. That is Interpretative Bulletin No. 1 on general coverage, and I have here another one on retail and service establishments. It is the only copy I have. I did not think the question would come up or I would have been supplied with more.

The COURT. I think that is perhaps the crux of the thing.

Mr. REYMAN. "Service and retail establishments are considered in the same sentence in the Act and the same criterion of intrastate commerce is made applicable to both." That is, they may be included if the major portion of their business is out-state, as the statute says. It is the sort of an exemption which the Sixth Circuit Court of Appeals in the Hawkeye case said must be narrowly construed to give effect to this remedial statute.

The COURT. Why do they call it a remedial statute, I have wondered. I should think it was part of the substantive law of the United States.

Mr. REYMAN. It is.

The COURT. Why do you call it a remedial statute?

Mr. REYMAN. That is the language of the court. It gives a remedy and confers rights within this statute for employees. Under another section of the Act it confers the right to sue

for their back wages and it confers benefits. It grants rights and I suppose for that reason it is called remedial.

The COURT. It never occurred to me in the wildest flight of my imagination to call that a remedial statute. But it does not make any difference if they state a general policy and a general rule and then they state an exception to that rule. I suppose that you have to, on all the facts, bring the thing within that exception. I don't know whether it is common ground or not that you deal with this act applying to employees rather than applying to employers. Is that common ground?

Mr. MERRITT. No, your Honor. We claim it can only apply to where the employer is obviously engaged in interstate commerce. That is one of our contentions.

The COURT. You contend it may apply to employees? You deal with it in a granulated fashion.

Mr. REYMAN. Yes; those are your words, and I think they are very good.

The COURT. That it applies to employees whose employer may not be engaged in interstate commerce?

Mr. REYMAN. Our contention very shortly and concisely is that the very words of the statute, without regard to congressional intent, makes the test the occupation rather than the employer test, and going further and going back to legislative intent, that it is made positively certain by the legislative history, a short part of which we gave to your Honor, which shows conclusively, I think, that the Congress started out, at least in the House, with the employer idea in mind, and that the bill as finally enacted and finally passed was just so diametrically opposite, you might say, that there could be no doubt of the intent of Congress, because "employer" was changed to "employee."

The COURT. So that would lead to the fact that I could, dependent upon what I thought about it, include as part of the production of goods for commerce, any part of those people whom I thought properly could be described as working on the goods or in an occupation necessary for the production of them.

Mr. REYMAN. Yes, sir. For practical everyday purposes in the administration of the Act, the Administrator recognizes what we generally call segregation of employments. That is, of two people working for the same employer, one of them may be engaged directly in commerce or in the production of goods for commerce, and the man working with him may be in an occupation which will not confer the benefits of the statute upon him. That is the necessary interpretation of

the statute as it is written, and that is the interpretation the Administrator puts into effect in the administration of the law.

The COURT. I cannot quite see why it means such curious results. It seems to me strange to have that sort of division.

Mr. REYMAN. No; I do not believe so. When the Congress was enacting this statute it had in mind enacting a statute to correct certain abuses in commerce and to foster fair trade in commerce; to create certain conditions of employment or standards of employment; to raise to proper level, to minimum level, the Congress says, the living conditions of a certain number of the people subject to its control, those people engaged in commerce or in the production of goods for commerce, and "production of goods for commerce" is clearly defined. It says very clearly occupation, process, or occupation necessary to interstate commerce. That is the congressional intent.

The COURT. I am frank to confess that when I started in with the case I read the statute first, and looked through the whole thing, and after reading your briefs on both sides, I was rather under the impression that the separation of the employees of a person not engaged in interstate commerce, confessedly not, would be quite a possible thing. But then as I thought of it more and more, it seemed to me that you have to think of the adventure, so to speak. That is a phrase of art in the maritime law; the whole bundle of stuff that is going out; not necessarily the goods or cargo or the ship, but everything, and you had to think really, to arrive at a proper interpretation of the statute, of the whole adventure, we will call it.

In other words, X decides to make dresses, and he goes to a city to settle down and make them. There are several ways he can do things. Of course he has to get power. He might have steam power that he produced himself, and he might have electric power which he rented from the local source of such power. I am just thinking out loud in order to let you have something to shoot at. I should rather think that perhaps if a person, for instance, went to settle down in a new city with a business that he wanted to do, he sort of carries his business in a bundle with him and he plumps it down. He could do it in several ways. He could rent the space in which he was going to do it and have whatever was given there for his needs, and then he could carry on in that way; or else he could build his own business and then do his own stuff, and then it would be more likely that more of his employees would

be engaged in the production of goods for commerce than if he, so as speak, had a different setup which would be entirely optional with him, where he paid somebody else, as in the nature of an independent contractor, to do those things.

There is another thing that rather stuck in my craw. Interstate commerce, I can realize, is like a great texture, all over the United States; and impact, by a strike or anything else, at one part of that stretched texture, is felt throughout the whole. Or you could say it was like a lake; and if you drop a log into it, that will have its repercussions and waves resulting from that act. While you may not be acutely conscious of it in one part, there is some impact from it.

I can understand all those things, and I realize exactly how that works out. I was a little bit doubtful, as I think I suggested to you yesterday, that you could possibly say the employees of the Edison Electric Company were in this category. Assuming they do not serve other states, and I don't know, but take an electric company which just serves, we will say a community. I do not see how you could possibly say because people like these came in and settled down and put their bundle of business, so to speak, into a rented place or a place that they own, where they bought electricity to run their machines. You could not possibly say that because a strike of the Edison employees would disturb the operator who is engaged in making dresses, that would pull the employees of the Edison Company into interstate commerce.

Mr. REYMAN. That in itself would not. It would be only an incident. In other words, you say because the Edison people might strike, because of that strike the Arsenal Building people may not be able to work, and the people in that building could not produce, then the Edison employees would not be considered engaged in production of goods for commerce.

The COURT. You agree they would not be?

Mr. REYMAN. I am not prepared to attack that problem. If your Honor will bear with me for a moment I will come back to it. The Consolidated Edison employees as a matter of fact literally and figuratively have been in that kind of occupation which is held to affect commerce, under another statute.

The COURT. What other statute?

Mr. REYMAN. Under the National Labor Relations Act it has been held specifically that the employees, electricians, and the members of the organization down there at Consolidated Edison, or that the business of Consolidated Edison is such as to affect commerce within the meaning of the National

Labor Relations Act. Even so, their heat and power is all generated in the State of New York and none goes out. It is the effect on commerce, the Supreme Court of the United States has said, which brings the Consolidated Edison Company within the purview of the National Labor Relations Act so that it is required to recognize its employees for the purpose of collective bargaining.

But I think that is another question. Let us go back to your adventure for a moment. Let us take Max Wiesen, the largest tenant in the building, with five floors. Suppose he decided the rents were too high, or suppose for any of a variety of reasons he decided he did not care to remain in the Arsenal Building and moved out lock, stock, and barrel with everyone he now employs. He would not have heat in the separate building he would either rent or erect. He is now by himself carrying out an enterprise of his own. So it becomes necessary for him to supply in the first instance heat, light, power, and all the things he needs to carry on his business of manufacturing dresses. As time goes on he sits in that building all by himself, not with the other forty some odd tenants in the Arsenal Building, and it becomes necessary to repair—windows broken out, the floors scuffed, they have to paint the walls, and it becomes absolutely necessary for Max Wiesen in order to efficiently produce goods for commerce to have this extra help.

We say all of the people in the building are dependent on the men to move the goods in and out. They are dependent on Mr. Silvera, the mechanic, to come in and fix the windows, the flush tanks in their toilets, dependent on Mr. Silvera to repair the leaks of the pipes, dependent on the porters to sweep the halls. The buyers are coming in all the time, it is a busy building and the hall must be cleaned.

The COURT. I always thought the elevator men were the strongest part of your case.

Mr. REYMAN. It is the clearest to see, we grant you, your Honor. But the other occupations, the fireman who supplies the heat for the building, the night watchman who protects the tenants' goods because they cannot stay there under the protection of the electric eye alone for the reason that it does not intercept or stop a thief or marauder coming down the steps; the watchmen are essential, they run the elevators, they polish them, clean them, keep them in order.

The COURT. That could be a matter of pride, I suppose.

Mr. REYMAN. It is a matter of pride and a matter of good business.

The COURT. You could have a dirty building, and not have the elevators run at night. You could do a lot of things like that. It is really a question of commercial morale.

Mr. REYMAN. Will your Honor follow me, so as to see that Max Wiesen in a building by himself has to have someone to stoke his furnace to get heat, someone to put sockets in his electric lights, fuses in his fuse boxes—which of course you and I could do—and all those things that are necessary.

The COURT. I live in the country in the summer time, so I know all about those things.

Mr. REYMAN. Those are essential occupations. Necessary is the word. They might get along without them. The Congress used the words "necessary occupations" and "occupation necessary to the production of goods for commerce."

The COURT. Judge Kirkpatrick says "necessary" does not mean indispensable.

Mr. REYMAN. Judge Kirkpatrick agrees with Chief Justice Marshall, who said the same thing.

The COURT. Yes; he is one of the few people who still seem to agree with Chief Justice Marshall.

Mr. REYMAN. Judge Kirkpatrick?

The COURT. I say he is one of the few people who still seem to agree with Chief Justice Marshall. Anybody can quote Scripture for his purpose, and if you make up your mind that something is so you can always get a citation for it.

Mr. REYMAN. I do not think we have to go that far.

The COURT. No; I do not, either.

Mr. REYMAN. I think it is good authority. It convinces me. I think when we look at the congressional proceedings we find that the senators in conference and on the floor considered just what they were doing when they were enacting the statute. They considered whether or not these occupations were necessary for the production of goods for commerce. They considered whether or not these employees all went out. Suppose the electricians, firemen, and everybody were to go out of this building. It is, after all, different from Max Wiesen sitting by himself down in the country. The tenants depend upon these things, they pay rent for the services, and that is one of the reasons they are there. That is why we brought the word "fortuitously" to your attention the other day. They are not there fortuitously. It is in the middle of the garment district.

The COURT. It would not be good if they did things fortuitously.

Mr. REYMAN. They would not last very long.

The COURT. They know why they are in a particular building in a particular district; because the trade comes in. If they were in 135th Street in the Bronx they would not get any buyers. They have to get together in some form or other. But the real question in the case, it seems to me, and which I have been worrying about ever since I first had the case called to my attention about two weeks ago, is that Congress put in this a "service establishment." I wonder what they really meant by that. Might they not have meant just this sort of thing where somebody is engaged in servicing a building.

Mr. REYMAN. No; they did not. If I had known the point was going to be raised this morning I would have had ample authority here to give you. But we have here a copy of the brief filed by the Administrator in the Kirschbaum case, with which I am fairly familiar. I would like to give you my views as given to Judge Kirkpatrick, in part at least, in the brief.

The COURT. Yes; give them to me.

Mr. REYMAN. "The exemption provided by Section 13 (a) (2), applies to employees engaged in any retail or service establishment."

If you will bear with me, and bear in mind this was filed after trial.

"The evidence shows that defendant's building is occupied exclusively by tenants who are engaged in various types of manufacturing operations. Although the maintenance workers here involved are employed by defendants, rather than the tenants, they are nevertheless engaged in occupations connected with and necessary to the manufacturing operations of the tenants.

"The character of an establishment is determined by the nature of the activities carried on in it."

This is our brief, your Honor.

Since defendant's building is devoted exclusively to manufacturing activities, it is a manufacturing establishment. Such was the holding of the Supreme Court of Michigan.

The COURT. Yes; I understand that. You quoted the Supreme Court of Michigan case, and Judge Kirkpatrick did, too.

Mr. REYMAN. "In that case the plaintiff, an employee of a contractor engaged to install a motor in a building tenanted by a manufacturing concern, sued the owner of the building for injuries resulting from a fall into the open shaft of a freight elevator. The owner did not occupy any part of the building. The plaintiff's cause of action rested upon a state statute imposing a duty upon the owner, agent or lessee to install ele-

vator safety gates in any 'manufacturing establishment, workshop, hotel or store.'

"In sustaining the lower court's judgment for the plaintiff the court said:

"'I construe the statute as imposing the duty upon the owner of the building and regard the words "manufacturing establishment" as meaning, in the particular section we are considering, premises in or on which a manufacturing business is conducted.'"

There is some comment on that section, but going on to the exemption:

"The term 'service establishment' as used in Section 13(a)(2), means an establishment, similar in character to a retail establishment, which sells personal service to the individual consumer for nonbusiness or noncommercial purposes."

That is what we think the service establishment is.

The COURT. Say that again. "For nonbusiness or noncommercial purposes?"

Mr. REYMAN. That is right. To the consumer, the man in the street, the person who drives up with his automobile to the service station, to the person who calls at the laundry or delivers his laundry to the service establishment. Let me just call your attention to the legislative history of the service establishment within the exemption:

"This is clearly indicated by the legislative history of Section 13(a)(2). The earlier drafts of the bills did not contain the exemption. Even these bills, however, were not considered as covering the ordinary retail and service trades selling to private consumers."

The exemption first appeared as an amendment exempting "any retail industry, the greater part of whose sales is in intrastate commerce."

That is 85 Congressional Record, 7437. "This amendment was offered by Congressman Celler, who stated in support of it:

"'If you want to eliminate retailing you should say so in clear-cut language, and this amendment which I offer indicates in the clearest way that retailing is exempted. * * * Accept it and then retail dry goods, retail butchering, grocers, retail clothing stores, department stores will all be exempt.'

"The amendment was accepted by the House, but in conference the section was rewritten to its present form and included 'service' as well as 'retail' establishments within the exemption."

The COURT. What does it say about services in the congressional history?

Mr. REYMAN. I think it is covered. The citation is H. R. 2738, 75th Congress, Third Session, pages 9 to 32.

The COURT. You can let me have that?

Mr. REYMAN. Yes; I will be glad to furnish it to you.

The COURT. I should have supposed that your most convincing answer to my suggestion about service would be that it says who sell or service in intrastate commerce. And you say the servicing in this case was that involved in producing goods for interstate commerce.

Mr. REYMAN. Yes.

The COURT. That is more of an answer than all this history, because they do not say what service means. We have seen what they really do here, and how much of all these folk that we are concerned with here, these maintenance employees, are involved in servicing something that is according to the decisions of the Supreme Court held to be interstate commerce or production of goods for interstate commerce. So that I should think that was your best answer. I may be wrong, but it would seem to me that was the answer that you might make.

Mr. REYMAN. It is an answer I might make. I might also say that by the very words of the statute the exemption 13(a) (2), applies only to any employees engaged in any service establishment the greater part of whose servicing is in intrastate commerce.

The COURT. That is exactly it.

Mr. REYMAN. That brings us into the question * * *

The COURT. In other words the testimony we have had here is really full. I think the case has been tried very fully and you have squeezed the last bit of juice you could out of it. It is purely a question of law now and up to me to find out how I ought to apply this.

I think it is perfectly clear, probably, that the servicing here is in what the Supreme Court has held to be production for interstate commerce. I think that would be the best answer and really be much more satisfactory, to my mind at least, than what Judge Kirkpatrick said. You see, he says it is not a service establishment. I should split with him right there and say it is a service establishment. Then I go on to say, is it a service establishment whose service is in intrastate commerce, the principal part of whose service is in intrastate commerce; and I would say, query, whether it is principally in intrastate commerce. You see what I mean.

Mr. REYMAN. Yes; I follow your Honor. I know what you mean.

The COURT. There is no question of it being a service establishment.

Mr. REYMAN. Of a certain kind, but not the kind of service establishment contemplated by the Congress.

The COURT. I do not know what they contemplated. I live in an apartment house. We have elevator men, handymen, superintendents, and all the people mentioned here engaged in maintenance of that place—fixing the floors, painting the floors, and they are painting the elevators today, and it is very precarious to go up and down in those elevators. That is servicing as I have always understood it, and that is a service establishment. You have your apartment, you rent it, and then you have the service that accompanies it. I would say that is all servicing.

Mr. REYMAN. Of course, your Honor, you get railroad service, too, and there is interstate commerce; and also airplane service. You can carry the word "service" very far.

The COURT. No; first you have to determine whether the thing is a service establishment or not. Then you have to determine whether the servicing is intrastate or interstate commerce. I think your strong point is that this is a servicing in what has been held by the Supreme Court to be——

Mr. REYMAN. Manufacture or the production of goods for commerce.

The COURT. The production of goods for interstate commerce. For commerce, and that means interstate commerce. I think that is what this is, and that may be the turning point of it. I was wondering, as to Judge Untermyer's case, which is the strongest case against you——

Mr. REYMAN. It is.

The COURT. I will find it here. As it turned with him it reads "engaged in process or occupation necessary to the production of goods in interstate commerce."

Mr. REYMAN. He used the employer test in that case as I understand it. He said that the maintenance employees in question were not employed by an employer engaged in commerce or the production of goods for commerce. We say that that is, of course, erroneous. If that were true you would then never find a maintenance employee subject to the provisions of the Act and entitled to its benefits.

The COURT. Perhaps you were not intended to, I don't know. It really seems to me that the exemption, the servicing exemption, is something that is the real crux of it. That is a servicing establishment I should hold, and then the Supreme Court has said that the tenants are engaged in interstate commerce and are producing goods for interstate commerce.

Then perhaps we have to say that certain of these maintenance employees at least would come——

Mr. REYMAN. How can you get away from the elevator operators? They are indispensable to the production of goods for commerce.

Mr. MERRITT. I will attend to that later.

Mr. REYMAN. They are absolutely indispensable. If it were not for the elevators the tenants would not be in the building and would not do what they are doing—in the upper floors at least.

The COURT. No; we all realize that.

Mr. REYMAN. The maintenance employees are indispensable, all of them, to the production of goods for interstate commerce, except possibly the fireman in the summertime. Even then, he is the one who sees that the tenants get hot water.

The COURT. Hot water is not necessary to commerce or anything else. It may be necessary for shaving and such purposes.

Mr. REYMAN. It is necessary because it facilitates commerce, helps it along. It is a convenience to commerce certainly. By the same line of reasoning your Honor might say that they do not need lavatories on the 20th or 21st floor.

The COURT. You find some places down south they do not have them.

Mr. REYMAN. It just seems so crystal clear that the tenants are in this building because it is a large building situated where it is, for particular purposes, convenient to the hotels, railroad stations, and to numberless buyers from out of town. They come up there, their firms. The building is proud of its tenants, advertises them, Mr. Spear has said.

They get the good class of tenants in there that want to do a high-grade business, I suppose you would call it. They are the upper crust in popular dresses. That building is maintained for that type of tenant, and the maintenance employees, not only the elevator men, but all of them, are necessary to keep that type of tenant in that building, and to those tenants the porter who cleans the halls, the maintenance man who fixes their electric lights, showcases, and signs, are indispensable.

The COURT. I don't agree with you about their being indispensable. I do not know whether you could really call them necessary. I think the elevator man is your strongest point, but you don't have to have people who casually run an elevator, fortuitously—coming back to that celebrated adverb—included. That does not necessarily get him involved. In other words, one might get involved in interstate commerce

when he did not intend to at all. No, I think you have to have a vocation that takes you along with it, and if an elevator man relieves somebody else for a little while or something like that, it should not be included.

Mr. REYMAN. Your Honor is coming right around to the Killingbeck decision and the employer test, which is literally in conflict with the plain provisions of the Act and without regard to the intent of Congress. Under the Railway Labor Act, take the back shop employees of a railroad——

The COURT. That is obvious.

Mr. REYMAN. And the back shop employees were not in interstate commerce.

The COURT. The maintenance employees under the Employers Liability Act, for instance. I had a good many cases of that kind when I was sitting in the jury parts, and some maintenance employees are not included under the Employers Liability Act, and have not got the benefit of the waiver of certain defenses that the persons who are so employed have. There is a distinction and it is often hard to draw the line, and I think you have to take each case as it comes along. As I said before, there is nothing truer than that circumstances alter cases.

Mr. REYMAN. But I still think the intent of the Congress must be effectuated as stated in the Darby case.

The COURT. Certainly, but after all, you have to make up your mind what the intent of Congress was. And I want you to cover all the different points, because I am rather inclined to think that the answer to the thing is that some of them are in and some of them are out. I am not at all sure.

Mr. REYMAN. Let us look at another act for just a moment, the National Labor Relations Act. The National Labor Relations Board against Fainblatt, a Supreme Court case, 59 Supreme Court, 668. It is in 306 U. S. 606, and the facts as found by the Board were that the respondents were engaged in the business of processing materials in various types of women's garments. They operated what is known as a contract shop. The materials supplied were the property of the Lee Sportswear Company, located in New York City. The defendants were in Jersey. The garments were made in New York and shipped by truck to respondent's factory in New Jersey. The Supreme Court of the United States there in dealing with that small number of employees in the garment industry on a question of whether or not the business was such as to affect commerce, said this:

"Nor do we think it important, as respondents seem to argue, that the volume of the commeree here involved, though

substantial, was relatively small as compared with that in the cases arising under the National Labor Relations Act which have hitherto engaged our attention. The power of Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small. Hanley v. Kansas City Southern Ry. Co., supra. The exercise of congressional power under the Sherman Act, 15 U. S. C. A., §§ 1–7, 15 note, the Clayton Act, 38 Stat. 730, the Federal Trade Commission Act, 15 U. S. C. A., §§ 41 et seq., or the National Motor Vehicle Theft Act, 18 U. S. C. A., §§ 408, has never been thought to be constitutionally restricted because in any particular case the volume of the commerce affected may be small. The amount of the commerce regulated is of special significance only to the extent that Congress may be taken to have excluded commerce of small volume from the operation of its regulatory measure by express provision or fair implication."

The mere fact that the work done by the janitors, the handyman, his helpers, and the porters who changed the walls, the mere fact that it is not much, or their number small, does not affect the situation in the least if Congress intended to reach them, and under the definition of "produced" certainly Congress did, because it is admitted there can be absolutely no question that the tenants here are engaged in the production of goods for commerce.

The Court. Yes; that is common ground, I think. We all agree to that.

Mr. Reyman. Now, when your Honor is going over to the service establishment theory you are deserting the literal words of the Act, which say "occupation necessary to the production of goods."

The Court. I do not say that I am deserting anything. They have a section of a service establishment. If I should hold this was a service establishment then I would have to go further and hold that the majority of this work was in intrastate commerce, and there, perhaps, I would stub my mental toe on the fact that all these tenants are engaged, under the decisions, in producing goods for interstate commerce. So I am a little bit doubtful, but I think perhaps the best arrangement to make in order to be sure that this exemption section could be included would be for Mr. Merritt to make some sort of a motion to amend his answer and raise that question. Perhaps you think that is foolish. Perhaps you do not think it is worth while, but I am quite prepared for you to say so.

Mr. Merritt. Our trial memorandum submitted to you raised this question, and we thought we had properly raised it

at all times. If there is any question, I would like to put in the special defense. I did not suppose under our denials of our answer that it was necessary to plead this affirmatively, but if it is I am glad to plead it affirmatively. We certainly want to preserve that question, and I understand the Government does not intend to take the position that we are technically barred from that defense.

The COURT. Section 13(a) is mentioned in your brief. Of course you have not exchanged briefs, because that is not necessary, as they were trial briefs, but I notice that I have underlined in red pencil that the servicing must be in intrastate commerce, so we have the exact point, and I have had it in mind from the beginning as to what exactly the ambit of the servicing establishment should be. So you have the question whether all these employees come under the Act or not. I have not made up my mind really.

Mr. MERRITT. To make doubly sure then, may I make my motion now?

The COURT. Yes; certainly.

Mr. MERRITT. The defendants move to amend their amended answer by adding a fourth defense as follows:

That the defendant, Arsenal Building Corporation, and the defendant, Spear & Company, Inc., as its agent, are engaged in the operation of a service establishment within the meaning of Section 13(a)(2) of the Fair Labor Standards Act, and are therefore exempted from the application of the Act.

The COURT. You see, then I would not have to take the employer theory.

Mr. REYMAN. May I be heard on that for a moment, if your Honor please?

The COURT. Yes.

Mr. REYMAN. I object to the amendment at this time. I think it is untimely, and not in accordance with the latitude allowed under the new rules. After trial, with all the proof in, certainly it is not raised by the pleadings.——

The COURT. I am not sure that it is not raised by the pleadings.

Mr. REYMAN. It certainly was not until argument.

The COURT. I will allow it. It does not do any harm, and you won't have to reply to it, or do anything like that.

Mr. REYMAN. May we save our exception for the purpose of the record?

The COURT. Surely. You never take exceptions any more.

Mr. REYMAN. I knew it was true during the course of the trial, but I did not know that it was true during the argument.

The COURT. Curiously enough, the theory of the new rules

seems to be that you should try to get at the gist of things, and you can have amendments at any time you want to, and do almost anything that you think is proper. It is entirely within the judge's discretion. I don't see why we should not have that definitely raised, if it is not already raised by implication.

Mr. REYMAN. We have no objection to its being raised but we think it should have been raised at a time when we would have adequate time to answer and show that this was not a service establishment within the meaning of the Act.

The COURT. You do not have to do anything. You have all the proof you can possibly imagine, or at least that I can imagine, as to exactly what it is.

Mr. REYMAN. I am simply reserving the right, your Honor, with certainly no thought of criticism.

The COURT. I know, but I think that is the sensible thing to do. There is no use taking so much trouble with a case like this. I think this is something we have to consider. In other words, my whole idea of the case from the beginning was that all of the statute was involved so we would have to see how the whole statute worked out, and I think you have all the evidence that anybody could possibly conceive of on the subject; what this building is, what it does for its tenants, and all that. It is so detailed that it is almost too detailed.

Mr. REYMAN. As to the manufacturing. We agree that your Honor was very patient and listened to a great deal of testimony in respect to the manufacturing operations in the building.

The COURT. No; I am talking about the servicing of the building. That is what you dealt with. All those things you dealt with; the elevator men, and taking the highest juridical point that you reached in it—and leading down to the watchmen. You dealt with all the things that they did, and even brushing out the elevators with a broom and all that sort of thing. I don't see how you could imagine taking any more testimony on that.

Mr. REYMAN. Yes; but that was on the question of occupations, but we did not deal with the question of whether this is a service establishment. What is the establishment in the building? Is it Max Wiesen & Sons? Is it Schneck? Where is the service establishment?

The COURT. The service establishment is the owner of the building who is servicing these tenants.

Mr. REYMAN. And the establishment is the building?

The COURT. The establishment is the building.

Mr. REYMAN. The establishment may be Max Wiesen, just as service between Washington and New York. If your Honor looks at it as a service establishment you are simply going at it in another way to say that the question is to be determined by who is the employer of the employees, and that being so, no maintenance men will ever derive any benefits from this Act in any factory or anywhere else, if that is the law.

The COURT. No; I am not doing that at all.

Mr. REYMAN. What I am saying is that any employee, as it says here in the exception, engaged in a retail or service establishment, "the greater part of whose selling or servicing is in intrastate commerce" is not to be included.

Now if the Court please, if the greater part of the servicing done is in the production of goods in interstate commerce, then you get coverage, even being a service establishment, under the statute, and then you come to the clause——

The COURT. Who is the establishment? The Arsenal Building?

Mr. REYMAN. Yes. That is an establishment.

The COURT. Where does Spear & Company come in then?

Mr. REYMAN. They are the agents.

The COURT. They would perhaps be even more characteristically a servicing establishment, just as our real estate men in the apartment I live in are engaged in servicing the apartment. They hire the help and we pay them. I think that is a very interesting question.

Mr. REYMAN. It is indeed.

The COURT. And it is the sort of a case that you want to allow to sort of mature in your mind. There is nothing you could have added to your proof under the theory I have talked about.

Mr. REYMAN. I hope your Honor will permit us to brief the point. I am sure that we can add something to our trial brief.

The COURT. Oh yes, just so that you can get it in by Monday. You will have to serve that on the other side and get an admission of service.

Mr. REYMAN. Yes, your Honor, of course we will. Mr. Justice Stone said in the Darby case, and I think it is in point——

The COURT. I have that right here. About where is it?

Mr. REYMAN. It is in syllabus 6. It starts: "Hammer v. Dagenhart has not been followed."

The COURT. Yes; I have it.

Mr. REYMAN. And then following, the fourth paragraph after that one:

"To answer this question we must at the outset determine whether the particular acts charged in the counts which are laid under § 15(a)(2) as they were construed below, constitute production for commerce, within the meaning of the statute."

The COURT. Yes; I have that.

Mr. REYMAN. And then continuing on:

"As the Government seeks to apply the statute in the indictment, and as the court below construed the phrase 'produced for interstate commerce,' it embraces at least the case where an employer engaged, as are appellees, in the manufacture and shipment of goods in filling orders of extrastate customers, manufactures his product with the intent or expectation that according to the normal course of his business all or some part of it will be selected for shipment to those customers.

"Without attempting to define the precise limits of the phrase, we think the acts alleged in the indictment are within the sweep of the statute. The obvious purpose of the Act was not only to prevent the interstate transportation of the proscribed product, but to stop the initial step toward transportation, production with the purpose of so transporting it. Congress was not unaware that most manufacturing businesses shipping their product in interstate commerce make it in their shops without reference to its ultimate destination and then after manufacture select some of it for shipment interstate and some intrastate according to the daily demands of their business, and that it would be practically impossible, without disrupting manufacturing businesses, to restrict the prohibited kind of production to the particular pieces of lumber, cloth, furniture or the like which later move in interstate rather than intrastate commerce.

"The recognized need of drafting a workable statute and the well-known circumstances in which it was to be applied are persuasive of the conclusion, which the legislative history supports, * * * that the 'production for commerce' intended includes at least production of goods, which, at the time of production, the employer, according to the normal course of his business, intends or expects to move in interstate commerce although, through the exigencies of the business, all of the goods may not thereafter actually enter interstate commerce."

That case concerned a lumber mill. The Government indicted for a failure to conform to the provisions of the stat-

ate. Among the employees there at that lumber mill, situated within the boundaries of a State, were every type of employee that you can find. There were maintenance men who kept up the equipment, machinery, and so on; they were all working within the State. Certainly there the men who worked on the machines, the saws, or whatever they were, and who kept the whole manufacturing process going, through repair and daily attention, were servicing in some sense of the word, but they were not servicing in the sense of the exemption words in the statute.

The COURT. No; they were not servicing in the sense of the exemption words in the statute.

Mr. REYMAN. In the Gonzales case, the Puerto Rican sugar manufacturers case, the First Circuit there took in helpers, watchmen, maintenance men, in the dead season, mind you, because their occupations were necessary to the production of the goods for commerce. Those people down there guard and watch the sugar-manufacturing plant, the people down there who were just at the plant working around there making repairs, and so on, during the dead season, the First Circuit has held were in occupations necessary to the production of goods for commerce. The record in that case shows that the court specifically amended the order to include those maintenance employees. Now here are a number of them that the bill of complaint and the record in the case shows were covered: the helpers to mechanics engaged in repairing and maintenance work in the petitioner's sugar mill; the helpers to the mechanics; the mechanics themselves; messengers employed in petitioner's general business; messengers at the plant, on the premises where they were producing sugar; again telephone operators doing general work for petitioners; certain telephone operators are engaged in some kind of a service——

The COURT. Oh, that is not a servicing establishment. Everybody knows what those things mean.

Mr. REYMAN. And finally the watchmen, watching the petitioner's mills at night. Those were the type of maintenance employees that the First Circuit says were covered.

The COURT. Were not they all direct employees of those people?

Mr. REYMAN. The trustee was operating the Eastern Sugar Mills, as I understand. Without laboring the point, I simply want to call your Honor's attention to the final statement in our brief on this employer test which I think is perfectly applicable to the service establishment:

"Moreover, the Killingbeck decision provides an easy method for evading the act. Under that decision a manufacturer can

escape his obligation under the act to his maintenance employees by simply discharging them and obtaining the services which they perform from some third person. A construction permitting such evasive practices is one which should not be countenanced by the courts."

The COURT. Well, in other words, there ought to be a restriction on freedom of set-up, we will say, that anybody engaged in production for interstate commerce, which nobody would do, by having the sanction which followed him if he changed his methods, and instead of employing the people himself he employed them through independent contractors or through a building where he leased premises. Isn't that what you would say?

Mr. REYMAN. We say that if your Honor should hold that those employees are not engaged in occupations necessary to the production of goods for commerce, that under that reasoning no maintenance employee will ever be considered necessary to or in an occupation necessary to the production of goods for commerce, and also it would open the way for very easy evasion of the clear intent of Congress.

The COURT. Well, what you say, for instance, is that it would lead to what you conceive to be my impending error——

Mr. REYMAN. I do not mean it that way.

The COURT. I know, but it would lead to a situation where the maintenance employees who are actually the employees—leaving out the servicing corporation entirely—the maintenance employees who are direct employees would be excluded from the benefits of this Act.

Mr. REYMAN. We say so. We say that if these employees here in this particular enterprise, whatever kind of an enterprise it is, in this particular building, are not entitled to the benefits of the Act, then no maintenance employee, whether he be in a separate factory sitting out in Jersey somewhere, or anywhere else, is engaged in an occupation necessary to the production of goods for commerce.

The COURT. I might arrive at a decision in your favor, but it would be an entirely different route, and the route that I should arrive at it by would be to say that this building was, in my opinion, a service establishment, and that the proof showed that the servicing was in the production of goods for interstate commerce, and I think that would be really the proper approach to it. But I am not at all sure I shall do that. I do not know. I am just talking the thing over and trying to hammer it out as one often can by talking back and forth.

Mr. REYMAN. I am trying to be as helpful as I can.

The COURT. I know you are, and I think that is about the way one should approach this case, because, after all, there is interposed between the tenants, who are confessedly engaged in producing goods for interstate commerce, and these chaps who are the employees of the Arsenal Building, a servicing establishment, which is the Arsenal Building, and we will say Spear & Company, too, comes under that description, who are engaged in furnishing nothing but services to these people. But then the question is whether, although, of course, all their work, and all their servicing, and everything they do is purely intrastate, as much as anything possibly could be, whether they are infected, so to speak, by the fact that the tenants are all engaged in producing goods for interstate commerce, and therefore drawn into the ambit of the statute by reason of the fact that they are engaged in servicing tenants who are engaged in producing goods for commerce—the house that Jack built.

Mr. REYMAN. Your Honor mentioned once or twice during the trial of the case that this was not a Labor Board case. I had asked a question or two with respect to membership in unions, and one thing and another. Remembering now for the moment the legislative history of the Act, as I see it, that the first draft said "any employee engaged in the manufacture of tools and dies," and that changed from that to "any employee engaged in any occupation necessary to the production of goods for commerce."

The employees in this particular building, and perhaps I should have gone further with the proof, and braved your Honor's displeasure, are organized into a local union of an international organization. They are all in the same union except Mr. Ferdinand, the superintendent.

The COURT. He is in another union.

Mr. REYMAN. He is in the superintendents' union.

During the hearings on the National Labor Relations Act in Washington, the question came up, and I will furnish the citation to your Honor, and Senator Wagner said that a tie-up of the maintenance men, or a tie-up by the maintenance men of a building in New York would certainly affect commerce. It is true this is not a Labor Board case, but that is simply an illustration——

The COURT. I have never disputed that and I should think it would be obvious, and we have repeatedly dealt with that.

Mr. REYMAN. But then when the hearings were on under the present Act, the same sort of testimony went in and I think it was Senator Wagner who specifically mentioned that

the benefits of the statute were intended to be conferred upon this type of employee.

Mr. ROZEN. The same type of employees as were benefited by the National Labor Relations Act, your Honor.

Mr. REYMAN. Now, under the National Labor Relations Act, employees are given the right to organize and bargain collectively, and so on, and they may petition the Board for an election to determine the representative, and the Board has considered many cases and the courts have considered many cases, and of all the number of cases considered among them are comparatively small establishments. The establishment is looked at to see whether the business of that establishment affects commerce. Under our statute generally, except for the specific exemptions of the statute, we look at the employee to see what his occupation is. It is not the size of the establishment. It is the commerce feature. The whole statute is based on the right to regulate commerce, and Congress certainly in regulating it, having specifically stated during hearings that this type of employees is to be covered, stating it during the conference report or proceedings or whatever it was, when it later on comes in with an exemption, certainly we cannot take the exemption to mean that it is the service establishment that Congress was talking about.

The COURT. Let me put this to you: supposing Congress had hearings and conferences and discussions about the thing, and then when they actually passed the Act with regard to those things, just as negotiations lead up to an agreement, if when they finally passed the Act embodied in their legislative act something that was left out of the conference that was contrary to it, or the meaning of the words, I don't see why you should hark back to what they said. I should think you would have to say that you would have to look and see whether the words of the Act themselves were intelligible. In other words, whether the crystallization of their conferences, just as the crystallization of the negotiations for a contract, resulted in something that did not have to be construed in any way, except that you read the words and there you are. It seems to me if they did not do that and did not really make it clear, then you look at the legislative theory, but you cannot go and look at the legislative theory to see what Senator this or that thought it was going to be. You have to look at the Act itself.

Mr. REYMAN. I don't think it necessary to go to the legislative history of this Act, because of the clear language of the Act itself, but when the meaning of the language of the Act

is in doubt, then it is proper to go to the legislative history.

The COURT. I have not any doubt of the meaning of the Act. The Supreme Court has spoken in those cases, and the decisions of the Supreme Court give me, and I think it is quite clear, what is a servicing establishment. I never supposed that the attentions of a lessor to a lessee in an office building or an apartment house or loft building or whatever you are talking about, could possibly be anything but a servicing establishment.

Mr. REYMAN. We agree on the apartment house and we agree on a retail store, and we agree on all those establishments where the nature of the business contemplates a service where production of goods for commerce or interstate commerce is not involved directly. The court in passing on the relation of the Red Cap, the porter who carries the bags for passengers in a station, in the Pickett case, said that that was an occupation that facilitates commerce. It helps it along.

The COURT. Just as the wheels do on a Pullman car. I should not think there was any doubt about the Red Caps. They are right in interstate commerce itself.

Mr. REYMAN. Yet the terminal operations are purely local.

The COURT. I think that all these terminal companies come under interstate commerce. I had a case where the Interstate Commerce Commission had dealt with the Hudson & Manhattan Railway Company and they practically said it was part of the Pennsylvania Railroad. The track was a different width and everything was different so it seemed to me to be more like a trolley car or interurban railway, so I decided in favor of the Hudson & Manhattan, following, as I thought, a Supreme Court decision, and then, ad interim, during the appeal there was a decision of the Supreme Court which reversed the case that I had referred to. It was not very well done, but I referred to it as a decision along the same line that my own was, and they reversed that case, so my case was reversed on appeal. They, in effect, held that the Hudson & Manhattan Railway Company, which all of you know is the McAdoo tube, was really a terminal part of interstate commerce and they also held that where they had a station in a terminal building that also was part of the whole set-up in interstate commerce. So I have not any doubt about interstate commerce being involved in all these things. But the great question is, when you look at the thing from the standpoint of what really is the relation of the people involved, whether it is a servicing corporation, all of whose activities necessarily are intrastate, you are led to ask, have all of these employees been infected, so to speak, by the fact that the ten-

ants are engaged in the production of goods for commerce. It is not a question of the employers at all. I am not going on that basis. I am going on the question that it says "employees" in the Act. I am not going on the question of who is the employer, but I am going on the question of whether the employees of a servicing establishment can be affected by the businesses of the tenants whom they serve. That is the only thing, and I think it is a very good argument on your side, under the authorities, very good particularly for the elevator men. We can only think about this as alone for the moment. Never mind about other salutary laws that may have been enacted, but when you think about this act alone, where do you draw the line? Where would you say they stop? Would you say, if you only had this act, that the employees of the Edison Company would be engaged in interstate commerce because they were furnishing power to people?

Mr. REYMAN. I doubt it.

The COURT. I should doubt it very greatly.

Mr. REYMAN. I think the line is drawn when the facilitation of production, or when the facilitation of commerce ceases. I think that the line could be drawn when we reach that negligible effort, or the minimum of effort, the effort you disregard, that that is the practical test for the production of goods. I think here there is a substantial facilitation of the production of goods by these employees.

I can see your Honor's difficulty and appreciate it, but I think the line is not so hard to draw.

The COURT. It is awfully hard to draw lines, you know.

Mr. REYMAN. When you deal with the commerce statute, as your Honor well knows, you must look at your particular case.

The COURT. You look at the Supreme Court decisions on interstate commerce, and what they contain, and you never find a line drawn, because they have got to maintain this is free, in case something very unexpected turns up.

Mr. REYMAN. I do not mean to cut off commerce in general, but to draw the line with respect to the particular case. Your Honor has before you for decision particular cases—the elevator men, porters, starters, and others. I think weighing the facts with respect to each case, as the statute intends, will give you the answer, and I think the line there can be drawn.

The COURT. You draw the line outside all of them.

Mr. REYMAN. I go farther than your Honor goes at the moment, and as I hope you will go—I say the line is outside all of them. It facilitates and helps noticeably and sub-

stantially the production of goods for commerce. So far as the elevator men are concerned I say they are in commerce.

The COURT. You make a very good argument indeed, and I have been extremely interested in it. I think it is a profoundly interesting case. I think you see my difference from Judge Kirkpatrick.

Mr. REYMAN. I do.

The COURT. Who I think is a very good judge indeed. But I somehow felt that was where he went wrong, on the question of service establishment.

You might just start if you want to, Mr. Merritt.

Mr. MERRITT. Yes; I will start, your Honor.

The COURT. And stop at 1 o'clock.

ORAL ARGUMENT ON BEHALF OF DEFENDANTS

Mr. MERRITT. I wonder if I understood aright one of Mr. Reyman's contentions. He said at the outset that their contention was that the elevator men were engaged in commerce, and that the other employees were engaged in production for commerce. I just want to ask the question. I am not trying to commit you to anything.

Mr. REYMAN. That is not exactly right.

Mr. MERRITT. Let me ask the question; you do not mean to abandon the contention, then, that the elevator employees themselves are engaged in production for interstate commerce?

Mr. REYMAN. No.

Mr. MERRITT. All right. This statute is deserving of some specific attention in respect to its very definite scope. Mr. Reyman has referred to the National Labor Relations Act, and I am glad he did so because it gives me the opportunity of bringing out in clear outline the definite distinction between the scope of the National Labor Relations Act and this Fair Labor Standards Act.

The National Labor Relations Act deals with situations affecting commerce. That is a word which appears in the various crucial paragraphs. In fact, that phrase is assigned a definition in the beginning of the Act. When Congress came to pass this Act it did not care to go as far as it had gone in the National Labor Relations Act. So it proceeded to define in a very specific way the scope of the activities to which this Act applied. It limited that scope to people engaged in commerce and engaged in the production of goods for commerce. People engaged in activities affecting commerce are not in-

volved, except to the limited extent that they are people engaged in the production of goods for commerce.

The COURT. Let me put this question to you. We have here in New York a very excellent New York Labor Relations Board. It has functioned admirably for a long time. I happen to have acquaintance with various people who have been connected with it, and have observed the work they have done. What I would like to know is whether in this case if you had a strike of these maintenance men that would be dealt with by the New York State Labor Relations Act.

Mr. MERRITT. Your Honor has anticipated my statement.

The COURT. What is that?

Mr. MERRITT. You have anticipated my statement. Dealing with strikes all building service employees come under the exclusive jurisdiction of the State Labor Relations Board.

The COURT. That is what I thought.

Mr. MERRITT. And do not come under the jurisdiction of the National Labor Relations Board. And no employer and no union has ever claimed to the contrary, and neither of these boards in defining their mutual jurisdiction has ever claimed to the contrary.

The COURT. Of course, I had a labor case and the only real labor case that I ever tried. I tried it for two or three weeks and they finally settled it, so I did not have to write on it. It involved that LaGuardia Act, I think.

Mr. MERRITT. The Norris-LaGuardia Act.

The COURT. The Norris-LaGuardia Act. It was not wholly finished, so I do not know how the evidence would have come out. But it was of butchers on the East Side, and a strike which I should have supposed would have been under the State Labor Relations Board. It was all settled, so I do not know how it came out. It certainly was rather a local affair, although, of course, it might in its repercussions ultimately have reached inter tate proportions. As a general proposition I thought that was a local affair. Just as you say these maintenance employees' strikes are regarded as local affairs.

Mr. MERRITT. The Norris-LaGuardia Act applies——

The COURT. That is about getting injunctions, and it has a lot of safeguarding clauses in it.

Mr. MERRITT. Yes; and it would apply to a local situation if the Federal court was dealing with it within its jurisdiction.

The COURT. The reason I was dealing with it was because they were citizens of different states, so there was diversity of citizenship. That is the reason I happened to have it. It was an extremely interesting case. Nothing came of it, however,

because it was finally settled. I do not think either labor relations board had anything to do with it. There was some conflict of jurisdiction there between the two labor relations boards?

I am sorry to be so autobiographical, but I was thinking of this particular case, which was my only experience in this zone.

Mr. MERRITT. I was calling attention to the difference between an Act of Congress which deals with all activities affecting commerce, and an Act of Congress which deals only with commerce and the production of goods for commerce. I want to drive that point home by referring to the case of the Apex Hosiery Company, 310 U. S. 469.

The COURT. Did you have that in your brief?

MR. MERRITT. I am afraid I did not.

The COURT. All right, you tell me about it.

Mr. MERRITT. The only point in the case to which I call attention at this time is the distinction which the court drew between the Sherman Anti-Trust Law and the National Labor Relations Act. Heretofore, as your Honor knows, we have never regarded the production of goods for commerce as interstate commerce, and we felt unless the Supreme Court changed its position on the matter that the question of employment relations in production could not be called interstate commerce. But the court held that the National Labor Relations Act was constitutional, and that it applied to employment relations in concerns producing for interstate commerce because they affected commerce.

Then when the question arose in the Apex Hosiery Company as to whether violent interference with production for interstate commerce, and even interference with the shipment of finished products into interstate commerce, was a violation of the Sherman Anti-Trust law, it was quite natural for the plaintiff to turn to the labor relations cases and say, You have already ruled that acts of this kind apply to employment relations because of the immediacy—they used that word—between the production and commerce, and therefore we think you should apply the Sherman Anti-Trust law in this case. But the court said no, undoubtedly Congress could have legislated in the form of an anti-trust law to include everything affecting commerce, but Congress did not exhaust its power in that respect, and under the Sherman Act did not cover employment relations in production of goods for commerce, and that under the National Labor Relations Acts we were dealing with a different language.

Now I hope I have not overstated the case, but that is the fundamental idea that I gather from certain portions of it.

The COURT. That was a Sherman Act case, and they got triple damages.

Mr. MERRITT. Yes.

The COURT. I do not remember whether then the Circuit Court of Appeals in the Third Circuit had a question of jurisdiction. I had an idea there was some sort of question of jurisdiction there. It was very curious.

Mr. MERRITT. A complicated litigation. There were injunctions, damage suits—it is rather difficult to follow its entire history.

The COURT. I will look at it.

Mr. MERRITT. It is in our brief.

The COURT. I thought you had mentioned it because I remember thinking about that aspect of it. The Sherman Act does not cover employment for production; is that right?

Mr. MERRITT. Yes; that is what they held. Unless you could show that the interference with production was for the purpose of controlling the distribution of price or allocation of products in interstate commerce. I do not want to overlabor the point, but simply to call your Honor's attention to the fact that this National Labor Relations Act to which Mr. Reyman refers includes everything affecting interstate commerce, and this specific Act which we have before us is more definitely limited to commerce and to the production of goods for commerce. That is the only point on which I am journeying up that street.

The COURT. It is a two-way street.

Mr. MERRITT. As your Honor pointed out during the trial, the raison d'etre for this whole Act is the necessity in which the nation felt itself to be in order to prevent the undermining of labor standards, let us say, in the north, through interstate competition on the part of products which were made by concerns in the south, where the labor standards were lower. Otherwise I think it is fair to say that no one would have thought it desirable to make such an encroachment upon local responsibility. But it was the invasion of the products made under subnormal conditions into the markets where products were being sold which were made under higher labor conditions that made it necessary to treat this as a national problem.

The COURT. Also child labor.

Mr. MERRITT. And child labor; yes.

The COURT. I heard that Hammer v. Dagenhart, argued by Mr. John W. Davis, who was then Solicitor General, and another man, I think from North Carolina. I never could understand how they decided it the way they did. I was always absolutely convinced you could not send something through

that was made by child labor. I do not see why they could not have excluded it from interstate commerce, but the Court said they could not then. But that has been practically done away with.

Mr. MERRITT. Absolutely so. That decision has been.

The COURT. That is only common sense. I supposed it would be sometime.

Mr. MERRITT. Bearing in mind this general purpose of the Act, I was rather surprised that the plaintiff saw fit to strike out Paragraph 9 of this complaint, which referred to this problem of interstate sale and interstate competition. Perhaps I can throw some light on that in a few minutes. I do feel that the entire Act must be interpreted in the light of this broad general purpose which represents the necessity which brought it into being, and that instead of by implication broadening its applications it should be limited largely to situations which come within its general purpose.

In the case cited so often by my adversaries, United States v. American Trucking Associations, 310 U. S. 534, at page 543, the Court said in respect to the interpretation of Acts of Congress:

"Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one plainly at variance with the policy of the legislation as a whole this Court has followed that purpose, rather than the literal words."

Turning for a moment, then, to the facts of this case.

The COURT. Haven't we got to a good caesura?

Mr. MERRITT. I would be very glad to have lunch.

(Recess to 2.30 p. m.)

AFTERNOON SESSION

Mr. MERRITT. If your Honor please, because of the emphasis placed by opposing counsel on this National Labor Relations Act, which involved everything affecting commerce as distinguished from this Act, which only involves commerce and manufacturing, or producing goods for commerce, I want to particularly call your attention to the history of the Act on the question of the word "affecting."

The COURT. Of the Labor Relations Act?

Mr. MERRITT. No; of the Fair Labor Standards Act with respect to the word "affecting."

The COURT. Is there not a publication of the talks and conference reports and that sort of thing that I could look at? I will tell you quite frankly, I have gotten so interested in this

case that I am not going to try to decide it off the bench. I do not think I would be fair to it or either of you gentlemen, and so I find that I have a little time next week, and I am going to do some home work on it.

Mr. MERRITT. I have before me at this time a publication called Law and Contemporary Problems, which is the publication of the law school of Duke University, under the date of the Summer of 1939, and I am calling attention to the note of an article in that publication entitled "The coverage of the Fair Labor Standards Act." I think your Honor will find it an interesting article.

The COURT. Can I borrow that?

Mr. MERRITT. Indeed you may.

The COURT. I am sorry to say that Duke University publications are not easily available.

Mr. MERRITT. We will place this in your hands. The note says this:

"Other statutes, of course, are based on the theory of the power of Congress to regulate employers whose enterprises substantially affect commerce. The words 'production of goods for commerce,' were substituted in the conference report for the words 'affecting commerce,' which were used in the House amendment (83 Congressional Record, 9246):"

This leads me to the conclusion that the distinction between the National Labor Relations Act and the Fair Labor Standards Act, growing out of the omission of the words "affecting commerce" in the latter act, is one of real importance. It seems to me, as I listened to the argument of Mr. Reyman, that he was undertaking to go contrary to the terms of that distinction by insisting that this act applied to activities which merely affected commerce and was not limiting the application of the Act to commerce and the production of goods for commerce.

The COURT. Well, that would underline or lend emphasis to the idea that has been pointing itself in my mind of a kind of a bundle of a business being placed here or there or anywhere which was producing something that was sent into commerce, and then that would be under the Wages and Hours Act so far as its employees were concerned; probably, perhaps not all, but say for the moment that it would be for all of them, but it does not go outside of that, and Judge Kirkpatrick does, doesn't he?

Mr. MERRITT. Yes; and I am going to take that up, because I have a great deal to say about Judge Kirkpatrick's opinion. I was referring before lunch to the obvious and declared object of this law to maintain something like a

parity of working conditions in the production of goods for interstate commerce, or at least to protect the nation against interstate commerce in products which were produced under substandard conditions or under child-labor conditions. If you apply that principle to this case you will see how ridiculous it is to claim that a real estate venture of this kind comes within the general object and purpose of this Act.

It was testified by Mr. Spear that the labor cost of operating a building of this character was only 16 to 20 percent of the total cost of such an enterprise.

The COURT. You mean total cost of operating.

Mr. MERRITT. Yes.

The COURT. Annual cost.

Mr. MERRITT. Yes; exactly. The difference between the conformity to the provisions of this Act, as it is contended we should conform in this case, and nonconformity, would increase that wage six percent. That means that the total operating cost of the building would be increased about one percent.

The COURT. I cannot follow those figures.

Mr. MERRITT. I think you will see the general drift of my remarks. If one examines the rent paid by Wiesen & Sons and the total output of Wiesen in dollars, it appears that the rent cost is two percent of the manufacturing cost, so finally you find yourself forced to the position of deciding what is two percent of one percent or one-fiftieth of one percent, which would be the added cost of operation for Wiesen due to paying his share of this extra cost that belongs with this overtime provision of the Act as called for. In other words, it is negligible. In other words, referring to your Honor's own statement of trying to secure something like parity in production costs, so far as labor is concerned, it could have no influence whatsoever on the question whether Chicago products would have an advantage in the market as compared with New York products.

Some of us, I think, may be forgiven for being a little shocked at having a real estate venture brought within the purview of this Act. We all know the law of the situs is the law as to real estate, and if there is anything that is essentially in one place and subject to local law it is real estate. And we know the essence of real property, like the essence of any property, is the dominion over its use. So it is rather shocking to us to have it contended that a real estate operation such as this is no longer subject to state regulation in respect of matters of this kind, but is subject to federal regulation merely because by accident or inci-

dent, or through the choice of the type of customers which its tenants may have made, it involves that degree of association with interstate commerce.

The COURT. Now what would you say of a building exactly like this, we will say, that Mr. Max Wiesen owned, a whole building like this, and it was a five-story or six-story building where he had watchmen and everything else—what would you say in that case; that any of the employees who were engaged in the maintenance of his building would come within the purview of the Wages and Hours Act?

Mr. MERRITT. If I understand your Honor right, I would say yes. I would say that they did come within the purview of the Fair Labor Standards Act and that is one of the things I am going to take up in a moment.

The COURT. All of them would?

Mr. MERRITT. I did not say all.

The COURT. That is why I asked you "all." Some of them would, and some of them would not. That is what I was wondering.

Mr. MERRITT. I would say that some of them did not.

The COURT. That was my first impression about it, but these decisions of all these District Judges all over the country seem to be against me.

Mr. MERRITT. Your Honor is correct in that. I think that most of the decisions which involve the question of a watchman employed in connection with a manufacturing plant held that he does come under the Fair Labor Standards Act.

The COURT. I should think the watchman was the man who was least likely to come under the Act perhaps of any of them. I do not know. Porters, I suppose, would be about the same.

Mr. MERRITT. Let me come now directly to the question as to whether these employees are engaged in the production of goods for interstate commerce. I think we might entitle this case Killingbeck v. Kirschbaum, or it may be, in some respects, Judge Woolsey v. Judge Kirkpatrick.

The COURT. I think it is much more apt to be that. It makes me feel very bold, for I have great respect for Judge Kirkpatrick.

Mr. MERRITT. There is an absolute conflict between the Killingbeck case and the Kirschbaum case.

The COURT. Oh, yes; but I should say neither of them were right, probably.

Mr. MERRITT. Turning now to Section 3(j) of the Act, which refers to the definition of "produced," and the definition of "engaged in the production of goods." It is based upon the

exact wording of that particular section that I wish to predicate most of my argument to the effect that these employees are not engaged in the production of goods for interstate commerce, and I am going to try to give your Honor my interpretation of this section, and the way in which I think it should be applied.

The section says "produced" means produced, manufactured, mined, handled or in any other manner worked on in any State. "In any State, and for the purpose of this Act an employee"——

The COURT. That is a capital "S." That is a geographical term.

Mr. MERRITT. Yes; a geographical term.

"* * * and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof in any State."

That section, from my point of view, is limited to things done in or about production. It was aimed to include every form of activity in or about production. There are very considerable numbers of words used so as to make sure that everything which had any direct connection with the production would be covered. Most of the words require the handling or transporting of the goods, but then as a catch-all there is the statement at the end "or in any process or occupation necessary to the production thereof."

Forgetting for a moment the shades of meaning as to the word "necessary," because they are not of so great importance to me in view of the construction which I give to this section, I want to call your attention to the fact that the whole paragraph is designed to define "produced" and "the production of goods," and the additional phrase at the end "or in any process or occupation necessary to the production thereof in any State"—with a capital "S"—is obviously to be determined in the light of the things which have preceded that last clause.

The COURT. Do you mean like the case we had I think yesterday, where somebody bought some goods here and sent them to New Jersey where they were processed and then were sent back to New York to the shop to be sold? I forget which one it was.

Mr. MERRITT. I am referring here to what was done on these premises.

The COURT. That was on these premises.

Mr. MERRITT. If these goods were processed on the premises, then that particular employee who processed the goods for interstate commerce would be engaged in interstate commerce. In that instance he would have touched the goods. It may be also in the course of manufacture he may be doing something incidental to manufacture which did not require him to touch the goods. He may have been mixing something which had to do with the processing of the goods.

The COURT. Like making the dye.

Mr. MERRITT. Yes. For instance, he may have had charge of the operation of the gas which made the steam that had to do with the irons. He would be involved because his would be an occupation incident to production of goods on those premises. He may have transported the goods in the sense in which I think this word was used here by pushing the racks around from floor to floor, or carrying them over his arm from one floor to another.

Congress had in mind everybody who was in any way related directly to the work of production in the production unit should be covered. And so after it went through this group of words which required producing, manufacturing, and handling, or something of that kind, it also used the words "or in any other manner working on such goods, or in any process or occupation necessary to the production thereof." A helper who stands by and hands something to a skilled mechanic in this establishment would in my opinion be covered by the Act. A man who oiled the machines would be covered by the Act. They would be engaged in an occupation——

The COURT. Undoubtedly.

Mr. MERRITT. Yes; but those instances illustrate to my mind what Congress intended when it used the words "or in any process or occupation necessary to the production thereof." However, it is my contention that after the goods crossed the line of the leased premises where they are produced, whether it be into a public place or on the public street, there to be picked up by a truckman or there to be transported by an elevator man who serves all kinds of people, they had passed outside the production premises and were not then considered in the type of transportation that Congress had in mind as transportation incident to the production of the goods. That is the practical place to draw the line as I see this proposition.

Let me give you perhaps an illustration which helps me more than any other. This industry needs needles. It buys needles from some local producer in New York City who

sells no needles to anybody outside of the state. Those needles are absolutely necessary to the manufacture of these garments. Judge Kirkpatrick's opinion would by this back-door method drive that local needle manufacturer into this ambit and make him subject to this Act merely because he sold needles to somebody engaged in the production of goods for interstate commerce.

Let me add one thing more. Let us assume the manufacturer in the course of his business has a broader vertical integration and manufactures his own needles on the premises. Then I am inclined to believe that the manufacture of the needles right then and there is a part of the work of production and might produce a different result.

So I am prepared to admit circumstances might arise even on this phase of my argument where the fact that an independent contractor doing the thing might turn the scales and exclude him from the Act, where, on the other hand, pointing to the same distinction made by Mr. Justice Untermyer, if that particular work was being done by the manufacturer himself as an incident to his own work of production, he might be under the Act. At least I pass that illustration on to you for what it is worth.

The COURT. Then I want to ask you, leaving out the National Labor Relations Board entirely for the moment, how about the purveyor of electricity to these tenants? The fact that it is sub-metered has nothing to do with it; that is merely a means of distributing it, keeping track of the cost and that sort of thing. Would the people who manufactured the electricity, who I suppose would be the Consolidated Edison in this case, because they certainly contribute something to the motive power—would their employees be pulled under the Act?

Mr. MERRITT. By reason of the fact? Absolutely no.

The COURT. Why?

Mr. MERRITT. That is an excellent illustration. Suppose this concern generates its own power through dynamos of its own.

The COURT. That would be different.

Mr. MERRITT. That would be a different situation. But if you go so far as Judge Kirkpatrick goes you have no limit as to time or space so far as the relation to the manufacturing is concerned.

The COURT. The thing that has been growing in my mind all the time is that you have got to get this concept of production for commerce and segregate it from all these other things, and that everything within this Act really is done up

in the adventure, as I called it following the admiralty law—in the adventure of making a profit, which is a serious adventure, really. I am thinking out loud a great deal here and I may change my mind at any time; I cannot tell. But that being so, don't you have to read all these things practically as intra-murals, I will put it that way, to the production, inside of production entirely?

Mr. MERRITT. It seems to me that is so.

The COURT. Then when you have taken this little bundle, your adventure of production, and when you have gotten to the end of the production, you have got a finished product, then it goes into interstate commerce and has been produced for interstate commerce, and the persons who produced it, whoever they may be and whatever their set-up, would be people under the Act, probably. Although I would not be prepared to say every person would be, I think the tendency would be to be hospitable to having them all under the Act.

When you get another kind of setup it is different. As I said before, there is that old remark that circumstances alter cases, and it may have an awful lot of good sense in it. It is an amazing thing as you sit here and see people come before you with this parade of questions how circumstances do alter cases. It seems to me that perhaps the thing here you ought to look at is Section 13. I suppose you are coming to that Section 13 (a), are you?

Mr. MERRITT. You mean the question of service establishment?

The COURT. Yes. Are you coming to that later?

Mr. MERRITT. I would rather go a bit further on this, if you don't mind.

The COURT. Oh, yes; absolutely. You see, there are a great many things in that which we will take up when the time comes. I do not want to spoil the order of your argument. I would rather read it in an orderly shape.

Mr. MERRITT. Judge Kirkpatrick said, "The employees involved here cannot be excluded from the operation of the Act unless the word 'necessary' is interpreted to mean indispensable."

Now I come to grips with that particular statement. I don't think that is true. The manufacturers of machines, of oil, the generators of gas and electricity, the cobblers that work on the employees' shoes, the delicatessen stores that feed them, are all necessary to the process of manufacturing in the sense in which Judge Kirkpatrick defines that word. But if we start by going that distance we are going on almost without limit throughout all human activities.

That statement is to the effect that all you have to show is that the particular article or service which is involved is in some way related, or may be related, to the normal process of manufacturing, in order to bring all these activities under the Act, merely because they make a business contract with somebody who produces for interstate commerce. I challenge that statement. I am not laying the emphasis so much on the word "necessary" as I am on the fact that he reaches the conclusion that if they are necessary, no matter how unrelated they may be as to time or space, they are brought within the ambit of this Act merely because accidentally or incidentally they supply products to a manufacturer, or materials or equipment to a manufacturer engaged in the production for interstate commerce.

I cannot believe that Congress ever intended to bring about such a result or such a complete demolition of the right of local self-government. And so I have tried to draw the distinction, pointing out that when we use all these words of manufacture, working upon or transporting, or doing any process or occupation necessary to manufacture, we are confined by the very nature of that section to the immediate work engaged in production for commerce. That whole section is nothing more than a definition of the word "produced."

If you accept the Government's argument in this case you are in effect saying that a manufacturer of machines in New York City, or a manufacturer of needles in New York City, is producing garments for interstate commerce because, forsooth, he sells machines or needles, or whatever it is, to a manufacturer who produces goods for interstate commerce. It is my contention that the question as to whether the manufacturer of machines comes under the Act in any case depends upon the activities of that particular manufacturer and not upon the activities of his customer to whom he sells goods.

So I have tried to point out as effectively as I can the fact that this particular paragraph is simply a definition of the word "produced" and of "engaged in the production for interstate commerce," and it refers to the particular productive unit to which it is attempting to apply the Act, and does not refer to the productive unit of somebody somewhere who may be producing spring water as drinking water for the employees of this establishment.

Like your Honor, I too have given great consideration to this matter and I presume like lawyers arguing cases for a longer period than your Honor, because my contact with this case is somewhat more extended. I too have had to think

a great deal about what seems to be the most reasonable place to draw the line. As far as production of goods for interstate commerce is concerned, every one of these words in Section 3 (j) can be explained as defining the kinds of activities taking place in the particular manufacturing establishment as an incident to the work of production. But as soon as those goods cross the threshold and go out into the public thorough...re——

The COURT. As soon as they are produced.

Mr. MERRITT. As soon as they are produced.

The COURT. As soon as your adventure is completed.

Mr. MERRITT. That is a more effective way of putting it than the way I did.

The COURT. I do not know whether it is or not, but it is from my old admiralty system. As soon as the adventure is complete you have a piece of finished goods or finished product. Then what happens to it is on the knees of the gods, is that the idea?

Mr. MERRITT. That is the idea exactly. Here is the Major Trucking Company, an excellent example. It shuttles back and forth between buildings with the products put out by these particular manufacturers. It is not brought under the auspices of this Act as a concern engaged in the production of goods for interstate commerce. It is a separate entrepreneur engaged in an activity not in any sense of the word a part of production.

I have to concede that transportation is necessary in one sense to the successful operation of a production establishment, but it is not necessary to production. Neither is the operation of the elevator essential to production. Those are outside activities and not involved in this Act. On the other hand, the pushing of the racks around the floors would be, or the manipulation of a crane overhead to carry the products in the course of manufacture from one place to another. They seem to me to represent activities which are within this section of the Act.

The COURT. Do you think the elevators should be regarded as a privilege instead of a necessity?

Mr. MERRITT. No; I do not, and I am willing to admit, and thought I had already admitted, that the operation of the elevator is necessary to the successful operation of a manufacturing enterprise. But it is not necessary to production.

The COURT. You are thinking of production exactly the way I was thinking of production, as something from the beginning of the raw material, the grey goods in this case, until it comes out as a finished product?

Mr. MERRITT. That is right.

The COURT. And the things that happened within that little cocoon of activity, we will say, that is all involved in production.

Mr. MERRITT. Exactly. I would be willing to admit—and this shows you how close I am trying to get to the line, and trying to be essentially honest intellectually in this matter—I would be willing to admit for the purpose of the argument that Mr. Wiesen's private elevator that runs up and down between floors represented an activity incident to production.

The COURT. Oh, I should think so undoubtedly.

Mr. MERRITT. That shows where I draw the line at least.

The COURT. Yes; but you would not say the employees engaged in the public elevators, freight elevators, passenger elevators, or whatnot, were under this Act, would you?

Mr. MERRITT. I would say decidedly they were not, for the same reason I would say the Major Trucking Company is not under this Act. You have gone out into the public halls and turned your product over to somebody else for transportation.

The COURT. The testimony, in effect all the testimony, is principally that the elevator men did not do anything but run the elevators.

Mr. MERRITT. That is all.

The COURT. Of course they might if they saw a rack of dresses going to tumble over, or something like that, stop its fall, and not come under the interstate commerce provision. At least, I would not suppose they would.

Mr. MERRITT. This process of infection seems to be very infectious. You will remember the testimony as to the extent to which each of these premises represents the particular kingdom of the particular tenant.

The COURT. Yes; I know, but I still think the only way that you can draw the line that seems to me successful, for inclusion and exclusion, is to do it from the point of view of that Section 13(j), and explore the question that is involved there.

Mr. ROZEN. 13(a)(2).

The COURT. As to whether it could be regarded as intrastate commerce or interstate commerce. I think there is something definite in the statute. I may be entirely wrong. I have approached all this with absolute ignorance; I did not know anything about the details of it. Somehow I got a feeling that if you really get down to the whole business you will find that a building like this is a service establishment. And then the question is whether the servicing is in intrastate or interstate commerce.

This interests me so much that I may cause you too much trouble by asking all these questions.

Mr. MERRITT. No; I think it is very helpful. I like the idea of conference rather than speeches.

It is our contention, as we set forth in our trial brief in a separate point, that the defendant Arsenal Building is a service establishment, and that its servicing is primarily in intrastate commerce. We do not feel that the intrastate character of our service can be changed by the fact, again using the same words, that incidentally or accidentally it may be tied up with operations which by the will of others are interstate in character. It is no concern of ours where these tenants ship their goods. Under normal circumstances I do not see how we would even know where they ship their goods. The nature of our activities it does not seem to me can be subjected to the change of operations of these tenants. One tenant today has all his customers in interstate commerce, and tomorrow has all his customers in intrastate commerce. It does not seem to me that changes the nature of the service which we render, or that by such contacts we become infected with the impress of the concept of interstate commerce.

Counsel for the Government admitted in his opening statement that they did not claim the building service men in the apartment buildings were other than in a service establishment. But there is not a type of employee here in this particular building but what so far as his occupational classification is concerned is matched by the same employees one finds in a large apartment. And by and large the service rendered is the same. I say that, of course, with due regard to the fact that your Honor realizes as well as I do that the volume of freight going up and down here is quite different from that which goes up and down in an apartment house.

The COURT. On moving day the freight that is carried into apartment houses is tremendous.

Mr. MERRITT. We think the status or nature of the service rendered is to be determined by our particular operations, which are local and intrastate, and are not to be changed from time to time, depending upon the particular class of people with whom we come in contact.

The COURT. Suppose another case. This may be an incredible supposition, but suppose Mr. Max Wiesen, we will say, were to decide he was only going to sell his things in New York City entirely, so there was not any interstate commerce involved in his trade at all, and he bought here and sold here. Would that affect the status? If he was your only tenant I

suppose that would separate you from the Wages and Hours Act, and you would come under whatever New York State act had to do with it.

Mr. MERRITT. Provided we were under it.

The COURT. I say under their contention.

Mr. MERRITT. Under their contention; yes.

The COURT. It all depends on so many other wills being involved, so to speak, rather than just your own. I would not be breast high with Mr. Justice Untermyer in what he says. I feel pretty certain that I would not be with Judge Kirkpatrick.

Mr. MERRITT. I certainly would be prepared to sustain Judge Untermyer's opinion as applied to the two employees that he there had before him. I do not think the last words have been said on the subject.

The COURT. His result might be right, but I will have to look it over again. I do not think I would approach it exactly that way, though I may be wrong. There were several judges there, and in numbers there is strength. I rather think the employer theory, what the employer does, is not quite the right theory, except to prove that the employer is a service establishment and is outside of the Act. Then the question is whether he is pulled back into the Act, so to speak, by a showing that the greater part of his servicing is outside of intrastate commerce. I may be entirely wrong, but that is the plan I am becoming more and more convinced of. Perhaps I am mesmerizing myself, I don't know.

Mr. MERRITT. In connection with this question of service establishment, I ask you again to bear in mind one of my contentions, that the character of the service rendered rather than its relation to somebody else is the real test. That a doorman who perhaps receives the goods from someone inside and tosses them to someone on a truck outside, although the goods may be consigned to a point outside the state—if he is a separate and independent employee in a service establishment, he does not, to my mind, come under this Act because his services are entirely intrastate.

The COURT. I cannot imagine what they were thinking about. If they talked about it at all when they talked about service establishments, I cannot imagine what they were thinking of except this sort of building. And other similar buildings, of course. There are lots of others you could mention.

Mr. MERRITT. For what it is worth, it is perfectly obvious that these employees are referred to as building service employees and belong to the Building Service Union. Ordinary

nomenclature is at least worth something or has some research value. Section 3(b) has the definition of "commerce"—commerce means trade, transportation, transmission or communications among the several States, or from any State to any place outside thereof. Turning then for a moment to the question of the service rendered by the elevator operator——

The COURT. That is perpendicular.

Mr. MERRITT. Yes; exactly. He does not transport from one state to another state.

The COURT. He could not transport from one state to another.

Mr. MERRITT. Your Honor will find in our brief statutes which deal specifically with this type of situation, and which use almost identically this language, where the courts have held that they don't extend to people who do not transport across the state line. One was a taxicab company hired by the Pennsylvania Railroad to transport passengers from one point to another right within the city. In view of the language of the statute, the court said they were not engaged in interstate commerce because they did not cross the state line. The same is true as to the Quarantine Act, the Mann Act, and various acts of this kind.

I think Congress acted advisedly when it rejected the words "affecting interstate commerce" and wrote a definition of "commerce" here which limited it to activities which went across the state line. If Congress even thought upon the subject, I do not think they would have been seriously disturbed by the idea that business men might disintegrate their business and divide it so each man might limit his activities to a particular state and thereby have a large part of their activities escape the Act. That seems to be the fear of the Government. Naturally business motives determine the integration of business.

The COURT. Profit is much more probably the cause than desire to escape the law, I should say. That is what I have to consider besides. Now are you going into this Section 13 (a)(2)?

Mr. MERRITT. Well, I am frank to say, your Honor, that particular section refers to what is a service establishment.

The COURT. I am with you there, but what I am interested in is if I should say it is a service establishment I could have the reply made "Yes, it is, but the greater part of its servicing is not in intrastate commerce." That is, another phrase comes in there, you see.

Mr. MERRITT. Exactly. My contention is that the servicing of this establishment has to be judged upon its own bottom, as to its own inherent nature, and not by the fact that it might become one thing or another, depending upon its association with other people. I cannot see any escape from the proposition that this is intrastate service. That is what I had in mind when I referred to the fact the elevators went up and down, and never crossed the state line. That is what I had in mind when I spoke of the porters cleaning the building.

The COURT. I just do not pay any attention to that, about porters being in the building, and that sort of thing. The only people I really thought had a look-in were the elevator people, and I was not very much impressed about the electrician, either. I thought the things he was doing were things, almost all of them he described, that I can do myself. And I have such a low opinion of my capacities in matters of that kind I should not think what he was doing really amounted to anything. I can put in a plug or put in a fuse. Everybody can do that if he knows the place where the fuses are kept, and where they should be put in.

Mr. MERRITT. I think it appeared very clearly that his duties were predominantly the duties of taking care of the building as a whole, and any little slight thing which he might do occasionally in the leased premises, at the request of the tenant, was negligible, and at least did not change the general character of his duties.

The COURT. It only involved maybe an expectation of a pour boire.

Mr. MERRITT. And that, of course, is not something that we should be chargeable for unless it could be shown we were tolerating it or encouraging it.

The COURT. No; I do not know that it is so unnaturally wrong.

Mr. MERRITT. And then I agree with your Honor if you are trying to pass on the question as to the status of the porter as an individual perhaps you have to consider the question whether he is operating as a relief man once in a while, or even regularly for a few hours a day, that the vocational test should be applied. And we would have the most chaotic condition if we were to decide that every building that had the slightest contact with interstate commerce, or every employee who might spend five minutes a day on something having to do with interstate commerce, brought the entire building under the interstate commerce provisions, or brought the employees into the service of interstate commerce.

The COURT. It does not appeal to orderliness of mind at all not to have the line drawn between service establishments and others. I think that is the thing myself, and that is something within the statute, and it is something that is definite, and it is something that if you draw the line there and say that this is a service establishment, and it is a real-estate matter engaged in intrastate work, then you have something definite that you can think about. As soon as you begin to split up all these employees into categories, and say "This man is not," and "The other man is here," you may have civil war in the Arsenal Building.

Mr. MERRITT. And your Honor should also be reminded as to the practical problems that arise in connection with personnel work. Congress is assumed to know something about these things. Would not this be a pretty picture if this man this week was under one schedule of hours by virtue of this Act, and another week was not, and two porters who work together, one running one elevator which goes to a tenant which produces goods for use within the city, and another one running to a tenant which produces for outside of the city, both observing the same hours and receiving different pay, or having different hours of employment? Business cannot be run that way, and I do not think that Congress——

The COURT. I think that is what this meant. I think that is what Congress intended when they said "servicing." I may be entirely wrong.

Mr. MERRITT. Thank you for your indulgence.

Mr. REYMAN. Just a few words, your Honor: directing your Honor's attention again to Section 13(a)(2), the (a) part begins:

"The provisions of sections 6 and 7 shall not apply with respect to"—and then 1, 2, 3, 4, and down the line through the sections. The (a) pertains to retail or service establishments, and what the plain meaning of that part of the statute is, is that in a retail or service establishment the provisions of Sections 6 and 7 are not applicable and no overtime and no minimum wage requirements need be observed.

Now the requirements come out of Section 7, so far as this case is concerned, and Section 7 mentions "production of goods for commerce." There is no production of goods for commerce of course in an apartment house. It would be foolish to say that there was.

The COURT. Of course there are a great many cases, aren't there, where women take those things in and sew on them and then send them back?

Mr. REYMAN. Then you would have a different situation so far as the person is concerned. She is not the establishment. She is a person and has an occupation. She may have an employer who is engaged in the production of goods for commerce and she may be an employee who is engaged in the production of goods for commerce. They may have a shop in the apartment house. That is the difference.

Certainly Congress in enacting this law had in mind commerce all the way through, and as was stated in the Darby case clearly:

"The means adopted by §15(a)(2) for the protection of interstate commerce by the suppression of the production of the condemned goods for interstate commerce is so related to the commerce and so affects it as to be within the reach of the commerce power. See Currin v. Wallace, supra, 306 U. S. 11," which was a regulation of intrastate local sales of tobacco.

The COURT. What page are you reading from? How does the paragraph begin?

Mr. REYMAN. It begins "The means adopted by § 15(a)(2)." 22 is the syllabus number in the report which I have.

The COURT. Yes; I have it now.

Mr. REYMAN. All right. Following after the citation of Currin v. Wallace,

"Congress, to attain its objective in the suppression of nation wide competition in interstate commerce by goods produced under substandard labor conditions, has made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer. It recognized that in present day industry, competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great."

Then referring to the House report.

"The legislation aimed at a whole embraces all its parts,"—comparing the Fainblatt case, which I mentioned this morning, and which, incidentally, is in 306 U. S. 606.

The point I am trying to make there is that it is for the Congress and not for the courts to say how far this power to regulate commerce shall be extended so that really the fact that the handyman may only put in a fuse now and then in one of the tenant's quarters does not by any means answer the whole question, because, as a matter of fact, the business time every day for so many days a week for the wages he earns is spent at the building performing, not just for one tenant or two tenants, but performing his general duties, and completing

duties which bring him within an occupation for the production of goods.

Just one or two more things, if your Honor please, that Mr. Merritt mentioned. On the question of the Consolidated Edison Company, which has been mentioned, and really I did not intend to belabor the National Labor Relations Act, or give it undue emphasis, but my reason for referring to it was to impress the point made in the Darby case in the paragraph just preceding the one I read, beginning "Such regulation is not a forbidden invasion of state power merely because either its motive or its consequence is to restrict the use of articles of commerce within the states of destination and is not prohibited unless by other Constitutional provisions. It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states."

Which brings me to the New York State Labor Relations Act, and in a case in 281 N. Y. Reports, p. 13, The Matter of Davega City Radio against the Labor Board, the court there, writing on page 20, said:

"It may well be that appellant's activities are sufficient to bring it within the National jurisdiction based on the commerce clause,"

and it cites Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197; National Labor Relations Board v. Fainblatt, 306 U. S. 601, cf. United States v. Rock Royal Cooperative, 307 U. S. 533.

In effect there it held that the exercise by the state of its power in this respect could not interfere with the right of Congress to legislate with respect to commerce, so it may well be that the right of the two Labor Boards with respect to building and maintenance employees is concurrent. However, I do not mean to place too much emphasis on the Labor Board cases.

The COURT. Of course whether the jurisdiction was concurrent or not would not decide the case one way or the other.

Mr. REYMAN. Of course not.

The COURT. It might be so to speak, a comfort to know they were in parallel and there had been a decision of some kind that held it was intrastate.

Mr. REYMAN. The point I am trying to make is this: the mere fact that the State Labor Board may have taken jurisdiction over building and maintenance employee cases in New York does not mean those employees' activities are purely local.

The COURT. I had an extremely interesting case before me about six or seven years ago called Campbell v. Chase National Bank, 5 F. Supp. 156, 169, and 170, affirmed 71 F. (2d) 669, 671, dealing with the plenary power of Congress in a zone of governmental action which had been delegated to the Federal Government. For example, that was the Gold Hoarding Act, and I considered it was equivalent to the power of a legislature of a unitary government, or the power of the legislature of one of our states, and that the ambit was always broad enough to achieve any object strictly within that zone or necessary to protect the boundaries of the zone.

So that covers this thing exactly; the sort of question we have here. In deciding Veazie v. Fenno, 8 Wallace 533, 539, 548–549, another important case, the Government took an appeal on the question of law to the Supreme Court and the appeal was dismissed on the motion of the Government in 291 U. S. 686. Then the other side tried to reinstate the appeal and the court denied the reinstatement at 291 U. S. 648. So that the only thing the Circuit Court of Appeals dealt with was some jurisdictional questions and what I did remained undisturbed, and I spent an awful lot of time on that case. So I think I understand how the necessary accompaniments of one of these statutes works out.

But here you have another kind of question. That is, you have an exception here, and I really do not know what on earth the exception means if it would not cover an establishment like this. If this is not a service establishment I would not know what it is. What is a service establishment?

Mr. REYMAN. A service establishment is that kind of an establishment devoted to rendering services not particularly concerned with production of goods, and the best definition is the definition that I gave you this morning.

The COURT. You mean in one of those bulletins? You can get one of those and send it to me. I do not think, as I said before, you can do justice to a case like this by deciding it off the bench, so I think I will reserve decision on this case and take it upstairs, where I will have a chance to consider it more au large, but I have told you of my doubts and fears on the subject, and we will just have to leave it at that. Do you want to add something?

Mr. REYMAN. I wanted to give your Honor two more cases that we do not have in our brief. The first one was decided February 24, 1941, in the United States District Court for the Western District of Kentucky, Baggett v. Henry Fischer Packing Company. It is reported in the Wage and Hour Reporter, Volume 4, page 133. I will be glad to leave you this copy.

The COURT. What is the other case?

Mr. REYMAN. That is the only one. I thought we had two.

Your Honor has been very patient, and we appreciate it. One other thing. I did promise your Honor that we would furnish you the legislative history of Section 13(a)(2).

Mr. MERRITT. And I am going to give you this volume on "Law and Contemporary Problems," and I want to say that in my presentation I did not deal with Point 1 of our brief, which is to the effect that the employer must be engaged in the production of goods for interstate commerce. I merely ask to invite your Honor's attention to our brief on that point.

The COURT. All right, but I am rather against you on that particular point, and my fulcrum, so to speak, is this Section 13(a)(2) which I think if that were construed the way I construed it, it will make perfectly good sense, and I don't see why it should not go that way. However, I will look at it and try to let you have some sort of an opinion by a week from today at least.

Mr. REYMAN. Your Honor will recall that you have our objection to the so-called partial defense raised in the amended answer before you. That has not been passed on.

The COURT. The partial defense was the fact that their arrangement with the union was——

Mr. REYMAN. Yes. It is marked Third Defense, separate and partial, and it states the union agreement with respect to hours. Is that a fair statement?

Mr. MERRITT. It really is not a partial defense.

The COURT. You might have a partial defense to a monetary claim, but how can you have a partial defense to an equity claim?

Mr. MERRITT. I think that is true, but it was an answer to their claim that we had not paid overtime after any hours over forty.

The COURT. Ad misericordiam, or something like that. This has been a very interesting case and I am obliged to you all for giving me the privilege of hearing it.

(Case closed.)

[CAPTION]

Stipulation

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto, that, subject to the approval of the Court herein, the appellant's exhibits

numbered "1," "2," "3," "4," "5," "18," "23," "24," "26," "27," "28" (except one rent bill for March 1941), "29" (except one electric service bill for period commencing August 20, 1940), "30," and "53," shall be omitted from the transcript of record on appeal, but shall be deemed to be included as part of the record on appeal with the same force and effect as if set forth in full in said transcript of record on appeal.

It is further stipulated, that, in the event either party hereto relies upon any portion of appellant's "Exhibit 18," he shall furnish the other party hereto, a typewritten copy of such portion as is relied upon.

Dated, New York, New York, June 10, 1941.

GERARD D. REILLY,
Solicitor.
IRVING J. LEVY,
Assistant Solicitor in Charge of Litigation.
ARTHUR E. REYMAN,
Regional Attorney.
IRVING ROZEN,
Senior Attorney,
United States Department of Labor,
Attorneys for Appellant.
McLANAHAN, MERRITT & INGRAHAM,
Attorneys for Appellees.

So ordered: 6/10/41.
CHARLES E. CLARK,
U. S. C. J.

Plaintiff's Exhibit 6

United States District Court, Southern District of New York

Apr. 1, 1941. Civ. 8-68

2/26/41.

GEORGE:
Repair hinge on door 16.
Charm—small room.
Have porters paint toilet floors in Flora-Dora Dress 5 floor East. Tell tenant to use toilets on West side of hall until tomorrow.

(Signed) By J. FERDINAND,
Supt.

Plaintiff's Exhibit 7

2/24/41.

GEORGE:

Install switch box cover in Schneck's show room 12 floor.

Put back electric fixtures in 14 floor hall.

Remove radiator in show room 16 SE. The radiator on East side of room only.

Check up on lamps in Annunciator in pass. car #3—Some lamps are out.

Plaintiff's Exhibit 8

2/25/41.

ARTHUR AND GEORGE:

Ease up windows in 16 SE.

Repair Electric Eye.

Check up on new work in Schneck 11 floor.

See that all globes are cleaned in halls.

Install angle irons in Wiesen's.

16 fl. slop sink leak—hot water.

Clean up high speed on spasic box on #4 pass. car, up speed.

Mr. Schneck would like new seats for the Ladies' room 11 floor East—2 seats.

Install light 11 fl.; slop sink.

Remove slop sink from 11 fl. to base storeroom.

Plaintiff's Exhibit 9

2/28/41.

Repair Blower in frt. hall.

Renew push button on 10th floor, front Car.

Check up on holes in Kaplan & Elias.

SAT.

Cement up holes in floor in frt. hall—Main.

By Mr. FERDINAND.

NOTES BY MR. SILVERA

Door check 10 fl. Mekritz—Freight Ent.

5 fl. front push Down.

Repaired #1 Freight Car Door, Main fl.

Plaintiff's Exhibit 10

3/6/41.

GEORGE:

OK Put cotter pin in Control on #3 Pass.
Repair flush switch in 16 floor hall.
OK Repair faucet in Joe-El—3rd floor.
OK Ease up windows in Royal Frocks.
Cut down B. X. in Vacant Store.
Fasten shelves in small room, 16th floor.
See Henry on 18th floor.

GEORGE:

Friday 9:00 A. M.
Disconnect lights in old show room on 11th floor West.
Levine will knock down walls and ceiling in this room.

Plaintiff's Exhibit 11

3/6/41.

GEORGE:

Put cotter pin on yoke in Control in Pass. Car #3. OK.
Repair hot-water faucet in Joe-El—3 floor. OK.
Repair flush on 16 floor-hall lights.

Plaintiff's Exhibit 12

GEORGE AND ARTHUR:

Repair lock on 7 floor centre; repair sink in Harry's lunch room.
Cut down B. X. in vacant store.
Take down renting sign over vacant store.
Take down platform in 10 floor hall and put same in vacant basement—East.
Rip down all Holmes strips in vacant store.
Have porters clean up 12 floor east today.
Install latch on partition door in toilet 12 West.
Install toilet seat in Ladies' room 12 floor west.

3/10/41.

Message for George. 3/10/41 Mon.
Hook up door check on hall door freight hall.
Repair sink in Harry's lunch room.
Ladies' on 11 floor out of order.

Plaintiff's Exhibit 13

3/11/41.

GEORGE AND ARTHUR:
Repair sink in Harry's lunch room.
Repair lock on door 7 floor centre.
Install latch on toilet door 12 floor West—Ladies.
Repair toilet seat in Ladies' room—12th floor.
Repair flush switch in 16 floor hall.
Take down renting sign on vacant store.
Rip down all Holmes strips from walls in vacant store—Not finished.
Cut down B. X. in vacant store.
Find out who took lamps out of test lights in Edison Room.

Plaintiff's Exhibit 14

3/25/41.

GEORGE AND ARTHUR:
Repair socket in fire stairs, 15 floor.
Install new screw on front door, main hall.
Repair radiator valve in Rona Dress 14.
Repair Electric Eye.
Install 3 Angle irons in Major Trucking.
Renew lamp in fire stairs bet. 2nd and Street—OK.

Plaintiff's Exhibit 19

MAX WIESEN & SONS CO., INC.,
DRESSES,
463 Seventh Avenue, New York City, March 25, 1941.

WAGE AND HOUR DIVISION,
9th Avenue, New York City.

GENTLEMEN: This is confirm telephone conversation, wherein we gave you the following information in accordance with your request:

Total Gross Sales	$4,872,708.00
Returns	1,398,466.00
Net Sales	3,474,242.00

The returns represent 28.7% of the gross sales.

Net New York Sales	501,042.00
Net Sales outside N. Y.	2,973,200.00

The above is for the calendar year 1939.

Very truly yours,

FAY SIMS.

FS:DK.

Plaintiff's Exhibit 20

Rent and W. & S.

Year	Month	17th floor	18th to 20th floors
1938	October	$1,264.00	$3,373.45
	November	1,264.00	$3,373.45
	December	1,264.00	3,373.45
1939	January	1,264.00	3,373.45
	February	1,264.00	3,373.45
	March	1,264.00	3,373.45
	April	1,264.00	3,373.45
	May	1,264.00	3,373.45
	June	1,264.00	3,373.45
	July	1,264.00	3,373.45
	August	1,264.00	3,373.45
	September	1,264.00	3,373.45
	October	1,264.00	3,373.45
	November	1,264.00	3,373.45
	December	1,264.00	3,373.45
1940	January	1,264.00	3,373.45
	February	1,472.34	3,373.45
	March	1,472.34	3,373.45
	April	1,472.34	3,373.45
	May	1,472.34	3,373.45
	June	1,472.34	3,373.45
	July	1,472.34	3,373.45

FAY SIMS.

Pay Roll 1940—
About 700 employees $1,272,583.36

1940

Gross sales	$4,694,535.91
Returns	1,444,768.53
Net sales	3,249,767.38
N. Y. State sales (Approx.) (Mth.)	54,000
Interstate	3,195,767.38
Mdse. sales Jan.–Aug. 1940	2,085,623.91
Less foreign	73,083.13
Total	2,012,540.78
City sales, gross receipts	322,597.21
Interstate (outside N. Y.)	1,689,943.57

FAY SIMS.

Plaintiff's Exhibit 21

Electricity

Year	Month	Amount	Year	Month	Amount
1938	November	$72.13	1939	October	$918.29
	December	934.72		November	169.74
1939	January	689.85		December	972.13
	February	952.69	1940	January	955.36
	March	859.13		February	979.45
	April	963.28		March	994.53
	May	958.34		April	999.76
	June	940.59		May	1,011.36
	July	923.93		June	1,014.87
	August	866.52		July	1,022.57
	September	952.03			

f Rebate.

U52,576. Arsenal Building Corporation.

Max Wiesen & Sons Co., Inc., Standard Form of Loft Lease. Management Division. The Real Estate Board of New York, Inc. Copyright 1937. All rights reserved. Reproduction in whole or in part prohibited. Dated January 22nd, 1940. Premises, 21st floor entire, 463 Seventh Avenue. Rent per year, $10,168.00. Rent per month, $847.34. Term, one year. From February 1, 1941, to January 31, 1942. Drawn by MJR.

FAY SIMS.

Plaintiff's Exhibit 22

Rep. Dept. ... Take Off	1½% of $..... R. C. J....
Ren. ..... T. L. Book...	3¾% of $10,168. Billed.....
E. C. Rec. .... Year Card....	If Renewal ..... % of $.....
Auditing ... Chart.....	Commission $381.30. Overriding Com. $.....
Commission Based On.....	Total Com. $381.30.

New Lease ☒ Add'l ☐ Renewal ☑

No. U52,576. Date 1/22/40. Leased by B. W. Lewis. Landlord, Arsenal Building Corporation. Tenant, Max Wiesen & Sons Co., Inc.; a domestic corporation. Present address (1 lease, 18–19–20) 21 west per plan. Premises, 21st Floor entire; Bldg. No., 463 Seventh Ave.; term; 1 year. Lease commencing 2/1/41, ending 1/31/42. Rent, $10,168.00 P. A. ($10,000 P. A. rent; $14 P. M. water & spr.). Rent payable $847.34 M. A. Croton water incl. in rent. Steam heat, Y. Elevator, Y. Sprinkler incl. in rent. Electricity, Reg. Business, Manufacture & sale of dresses—25% Zoning. Repairs: Remove certain walls & erect new walls & install freight doors as desig. on plan attached. 1/1 agrees to kalsomine walls & ceiling in easterly pt. now occupied by Roma Dresses. By separate agreement: 1/1 agrees to install A. C. current in prem. to make it possible that all machinery & lights, etc., shall be run under A. C. current. Can landlord cancel. No. Remarks: Water clause stricken out. Landlord will not unreasonably withhold its consent to sublet prem. or to assign this lease. See over. Approved—Draw lease. If lease is void—State cause—Over. References other side. Lease signed, Yes. Salesman, B. W. LEWIS.

Remarks: Nothing herein contained shall be construed so as to obligate Tenant herein to make any structural repairs; nor shall anything contained herein be construed so as to relieve 1/1 from using reasonable care & diligence in the operation of bldg.

Before 1/1 makes any repairs or alteration in prem. at the expense of tenant (other than emergency repairs) 1/1 shall give tenant at lease 5 days notice in writing of its intention in order to enable tenant to arrange for the making of such repairs or alterations instead of 1/1.

If either 1/1 or tenant becomes involved in any litigation arising out of this lease, neither parties shall be obligated to pay the legal fees, costs, or disbursements of other party other than those fixed by statute; nor shall either the 1/1 or tenant be required to waive trial by jury, anything in this lease contained to the contrary notwithstanding.

Standard Form of Loft Lease

The Real Estate Board of New York, Inc.

Agreement of lease, made this 22nd day of January 1940 between Arsenal Building Corporation, party of the first part, hereinafter referred to as Landlord, and Max Wiesen & Sons Co., Inc., a domestic corporation, party of the second part, hereinafter referred to as Tenant.

Witnesseth: That Landlord hereby leases to Tenant and Tenant hereby hires from Landlord, the entire twenty-first (21st) floor in the building known as 463 Seventh Avenue, in the Borough of Manhattan, City of New York, for the term of one (1) year (or until such term shall sooner cease and expire, as hereinafter provided), to commence on the first day of February, nineteen hundred and forty-one, and to end on the 31st day of January, nineteen hundred and forty-two, both dates inclusive, at an annual rental of Ten Thousand One Hundred Sixty-eight ($10,168.00) Dollars, which Tenant agrees to pay in lawful money of the United States, which shall be legal tender in payment of all debts and dues, public or private, at the time of payment, in equal monthly instalments in advance on the first day of each month during said term, without any set-off or deduction whatsoever.

In the event that, at the commencement of the term of this lease, Tenant shall be in default in the payment of rent to Landlord pursuant to the terms of a prior lease with Landlord or with Landlord's predecessor in interest, Landlord may at Landlord's option and without notice to Tenant add the amount of such arrearages to any monthly instalment of rent payable hereunder and the same shall be payable to Landlord as additional rent.

The parties hereto, for themselves, their heirs, executors, administrators, legal representatives, successors and assigns, hereby covenant, as follows:

1. Rent.—Tenant shall pay the rent as above and as hereinafter provided.

2. Occupancy.—Tenant shall use and occupy demised premises for the sale and manufacture of dresses, said manufacturing not to be conducted on more than twenty-five (25) per cent of the demised premises, in accordance with the Zoning Regulation of the City of New York, for said premises, and for no other purpose.

3. Assignment, Mortgage, Etc.—Tenant, and Tenant's heirs, executors, administrators, legal representatives, successors and assigns, shall not assign, mortgage, or encumber this agreement, nor underlet, or use or permit the demised premises or any part thereof to be used by others, without the prior written consent of Landlord in each instance. If this lease be assigned, or if the demised premises or any part thereof be underlet or occupied by anybody other than Tenant, Landlord may, after default by Tenant, collect rent from the assignee, under-tenant, or occupant, and apply the net amount collected to the rent herein reserved, but no such assignment, underletting, occupancy, or collection shall be deemed a waiver of this covenant, or the acceptance of the assignee, under-tenant, or occupant as tenant, or a release of Tenant from the further performance by Tenant of covenants on the part of Tenant herein contained. The consent by Landlord to an assignment or underletting shall not in anywise be construed to relieve Tenant from obtaining the express consent in writing of Landlord to any further assignment or underletting.

4. Alterations.—Tenant shall make no alterations, decorations, additions, or improvements in or to demised premises without Landlord's prior written consent, and then only by contractors or mechanics approved by Landlord. All such work shall be done at such times and in such manner as Landlord may from time to time designate. All alterations, additions, or improvements upon demised premises, made by either party, including all panelling, decorations, partitions, railings, mezzanine floors, galleries, and the like shall, unless Landlord elect otherwise (which election shall be made by giving a notice pursuant to the provisions of Article 28 not less than 3 days prior to the expiration or other termination of this lease or any renewal or extension thereof), become the property of Landlord, and shall remain upon, and be surrendered with said premises, as a part thereof, at the end of the term hereof. Any

mechanic's lien filed against the demised premises, or the building of which the same form a part, for work claimed to have been done for, or materials claimed to have been furnished to, Tenant, shall be discharged by Tenant within 10 days thereafter at Tenant's expense, by filing of the bond required by law.

5. Repairs.—Tenant shall take good care of demised premises and fixtures therein, and, subject to provisions of Article 4 hereof, shall make, as and when needed, as a result of misuse or neglect by Tenant, all repairs in and about demised premises necessary to preserve them in good order and condition, which repairs shall be in quality and class equal to the original work. However, Landlord may repair, at the expense of Tenant, all damage or injury to demised premises, or to the building of which the same form a part, or to its fixtures, appurtenances or equipment, done by Tenant or Tenant's servants, employees, agents, visitors, or licensees, or caused by moving property of Tenant in and/or out of the building, or by installation or removal of furniture or other property, or resulting from fire, air-conditioning unit or system, short circuits, overflow or leakage of water, steam, illuminating gas, sewer gas, sewerage or odors, or by frost or by bursting or leaking of pipes or plumbing works, or gas, or from any other cause, due to the carelessness, negligence, or improper conduct of Tenant, or Tenant's servants, employees, agents, visitors, or licensees. Except as provided in Article 11 hereof, there shall be no allowance to Tenant for a diminution of rental value, and no liability on the part of Landlord by reason of inconvenience, annoyance, or injury to business arising from the making of any repairs, alterations, additions, or improvements in or to any portion of the building or demised premises, or in or to fixtures, appurtenances, or equipment, and no liability upon Landlord for failure to make any repairs, alterations, additions, or improvements in or to any portion of the building or demised premises, or in or to fixtures, appurtenances, or equipment.

6. Glass.—Landlord shall replace, at the expense of Tenant, any and all broken glass in and about the demised premises. Landlord may insure, and keep insured, all plate glass in the demised premises for and in the name of Landlord. Bills for the premiums therefor shall be rendered by Landlord to Tenant at such times as Landlord may elect, and shall be due from, and payable by Tenant when rendered, and the amount thereof shall be deemed to be, and be paid as, additional rental.

7. Requirements of Law; Fire Insurance.—Tenant shall comply with all laws, orders, and regulations of federal, state, county and municipal authorities, and with any direction of any public officer or officers, pursuant to law, which shall impose any duty upon Landlord or Tenant with respect to demised premises, or the use or occupation thereof, but Tenant shall not be required to make any expenditure to comply therewith unless necessitated by Tenant's fault; and shall not do or permit to be done any act or thing upon said premises which will invalidate or be in conflict with fire insurance policies covering the building of which demised premises are a part, and fixtures and property therein, and shall not do or permit to be done any act or thing upon said premises which shall or might subject the Landlord to any liability or responsibility for injury to any person or persons or to any property by reason of any business or operation being carried on upon said premises; and shall comply with all rules, orders, regulations, or requirements of the New York Board of Fire Underwriters, or any other similar body, and shall not do, or permit anything to be done, in or upon said premises, or bring or keep anything therein, which shall increase the rate of fire insurance on the building of which demised premises form a part, or on property located therein. If by reason of failure of Tenant to comply with the provisions of this paragraph, the fire insurance rate shall at any time be higher than it otherwise would be, then Tenant shall reimburse Landlord, as additional rent hereunder, for that part of all fire insurance premiums thereafter paid by Landlord which shall have been charged because of such violation by Tenant, and shall make such reimbursement upon the first day of the month following such outlay by Landlord. In any action or proceeding wherein Landlord and Tenant are parties, a schedule or "make up" of rate for the building or demised premises issued by the New York Fire Insurance Exchange, or other body making fire insurance rates for said premises, shall be conclusive evidence of the facts therein stated and of the several items and charges in the fire insurance rate then applicable to said premises.

8. Subordination.—This lease is subject and subordinate to all ground or underlying leases and mortgages which may now or hereafter affect the real property of which demised premises form a part, and to all renewals, modifications, consolidations, replacements, and extensions thereof. In confirmation of such subordinations, Tenant shall execute promptly any certificate that Landlord may request. Tenant hereby constitutes and appoints Landlord the Tenant's attorney in fact to execute any such certificate or certificates for and on behalf of Tenant.

9. Rules and Regulations.—Tenant and Tenant's servants, employees, agents, visitors, and licensees shall observe faithfully, and comply strictly with, the Rules and Regulations set forth on the back of this lease, and such other and further reasonable Rules and Regulations as Landlord or Landlord's agents may from time to time adopt. In case Tenant disputes the reasonableness of any Rule or Regulation hereafter made or adopted by Landlord or Landlord's agents, the parties hereto agree to submit the question of the reasonableness of such Rule or Regulation for arbitration to the Chairman for the time being of the Board of Directors of the Management Division of The Real Estate Board of New York, Inc., or to such person or persons as he may designate, whose determination shall be final and conclusive upon the parties hereto. No dispute of the reasonableness of any rule or regulation shall be deemed a compliance upon Tenant's part with the foregoing provisions of this article unless the same shall have been raised by service of a notice in writing upon Landlord within ten days after the adoption of any such rule or regulation. Landlord shall not be liable to Tenant for violation of any of said Rules and Regulations, or the breach of any covenant or condition in any lease, by any other tenant in the building.

10. Property—Loss, Damage.—Landlord or Landlord's agents shall not be liable for any damage to property entrusted to employees of the building, nor for the loss of any property by theft or otherwise. Landlord or Landlord's agents shall not be liable for any injury or damage to persons or property resulting from falling plaster, steam, gas, electricity, water, rain, or snow which may leak from any part of said building, or from the pipes, appliances, or plumbing works of the same, or from the street or subsurface, or from any other place, or by dampness or any other cause of whatsoever nature, unless caused by or due to the negligence of Landlord, Landlord's agents, servants, or employees; nor shall Landlord or Landlord's agents be liable for any such damage caused by other tenants or persons in said building, or for interference with the light or other incorporeal hereditaments, or caused by operations in construction of any public or quasi public work; nor shall Landlord be liable for any latent defect in the building. Tenant shall reimburse Landlord as additional rent for all expenses, damages, or fines incurred or suffered by Landlord by reason of any breach, violation, or non-performance by Tenant, or Tenant's servants, employees, agents, visitors, or licensees of any covenant or provision of this lease, or by reason of damage to persons or property caused by moving property in and/or out of the building or by the installation

or removal of furniture or other property of or for Tenant, or by reason of or arising out of the occupancy or use by Tenant of demised premises or of the building of which demised premises form a part, or any part of either thereof, or from any other cause due to the carelessness, negligence, or improper conduct of the Tenant or the Tenant's servants, employees, agents, visitors, or licensees. Tenant shall give immediate notice to Landlord in case of fire or accidents to, or defects in, any fixtures or equipment of the building.

11. Destruction—Fire.—If the demised premises shall be partially damaged by fire or other cause without the fault or neglect of Tenant, Tenant's servants, employees, agents, visitors or licensees, the damages shall be repaired by and at the expense of Landlord, and the rent until such repairs shall be made shall be apportioned according to the part of the demised premises which is usable by Tenant. Due allowance shall be made for reasonable delay which may arise by reason of adjustment of fire insurance on the part of the Landlord and/or Tenant, and for reasonable delay on account of "labor troubles," or any other cause beyond Landlord's control. But if the demised premises are rendered wholly untenantable by fire or other cause, the Landlord shall decide not to rebuild the same, or if the building shall be so damaged that Landlord shall decide to demolish it or to rebuild it, then or in any of such events Landlord may, within ninety (90) days after such fire or other cause, give Tenant a notice in writing of such decision, which notice shall be given as in Article 28 hereof provided, and thereupon the term of this lease shall expire by lapse of time upon the third day after such notice is given, and Tenant shall vacate the demised premises and surrender the same to Landlord.

12. Eminent Domain.—If the whole or any part of demised premises shall be taken or condemned by any competent authority for any public or quasi public use or purpose, then, and in that event, the term of this lease shall cease and terminate from the date when the possession of the part so taken shall be required for such use or purpose, and without apportionment of the award. The current rental, however, shall in any such case be apportioned.

13. Elevators, Heat, Cleaning.—As long as Tenant is not in default under any of the covenants of this lease, Landlord shall, if and insofar as the building is qualified: (a) at Landlord's expense run elevators on business days from 8 A. M. to 6 P. M.; (b) at Landlord's expense furnish on business days from 8 A. M. to 6 P. M. sufficient heat to warm the demised premises, when, in the judgment of Landlord,

the weather requires it; (c) at Landlord's expense cause to be kept clean the halls, corridors, and public portions of the building, which are used in common by all tenants. Tenant shall, at Tenant's expense, keep the demised premises clean and in order, to the satisfaction of Landlord, and for that purpose shall employ the person or persons, or corporations approved by Landlord. Tenant shall pay to Landlord the cost of removal of any of Tenant's refuse and rubbish from the building. Bills for the same shall be rendered by Landlord to Tenant at such times as Landlord may elect and shall be due and payable when rendered, and the amount of such bills shall be deemed to be, and be paid as, additional rental. Tenant shall, however, have the option of independently contracting for the removal of such rubbish and refuse in the event that Tenant does not wish to have same done by employees of Landlord. Under such circumstances, however, the removal of such refuse and rubbish by others shall be subject to such rules and regulations as, in the judgment of Landlord, are necessary for the proper operation of the building. Landlord reserves the right to stop service of the steam, elevator, plumbing, and electric systems, when necessary, by reason of accident, or of repairs, alterations, or improvements, in the judgment of Landlord desirable or necessary to be made, until said repairs, alterations, or improvements shall have been completed, and shall further have no responsibility or liability for failure to supply steam, elevator, plumbing and electric service, when prevented from so doing by strikes or accidents or by any cause beyond Landlord's reasonable control, or by orders or regulations of any federal, state, county, or municipal authority, or failure of coal, oil, or other suitable fuel supply, or inability by exercise of reasonable diligence to obtain coal, oil, or other suitable fuel. It is expressly understood and agreed that any covenants on Landlord's part to furnish any service pursuant to any of the terms or provisions of this lease, or to perform any act or thing for the benefit of Tenant shall not be deemed breached if Landlord is unable to perform the same by virtue of a strike or labor trouble or any other cause whatsoever beyond Landlord's control.

15. Electric Current.—If Landlord shall purchase or produce the necessary electric current, Tenant shall purchase from Landlord the current consumed, and the bulbs or lamps used, in demised premises, and pay Landlord therefor at the prevailing rates or prices, from time to time, charged for similar service by any public service company serving the part of the City where the building is located. The amount

of current consumed shall be determined by a meter, to be installed by Landlord. Bills for current consumed, and/or bulbs or lamps renewed or replaced, shall be rendered by Landlord to Tenant at such times as Landlord may elect, and shall be due and payable when rendered and the amount of such bills shall be deemed to be, and be paid as, additional rental. In the event that such bills are not paid within 3 days after the same are rendered, Landlord may, without further notice, discontinue the service of electric current to the demised premises, without releasing Tenant from any liability under this lease and without Landlord or Landlord's agents incurring any liability for any damage caused by such discontinuance of service. Landlord may also discontinue such service upon giving to Tenant 30 days' previous notice in writing of Landlord's intention so to do, and thereupon Tenant may contract or otherwise arrange with any person, firm, or corporation for the supply of such lamps and current after the expiration of such 30 days. Tenant shall make no change in, and/or additions to, electrical equipment and/or appliances, in demised premises, without the written consent of Landlord first obtained. Rigid conduit only will be allowed by Landlord for exposed work. If, in the opinion of Landlord, Tenant's installation overloads any riser or risers in the building of which the demised premises are a part, Tenant will, at Tenant's own expense, provide an additional riser or risers for such installation; but no riser or risers may be installed without the written permission of Landlord. If any tax be imposed upon Landlord's receipts from the sale or resale of electrical energy or gas or telephone service to Tenant by any municipal, state, or federal agency, Tenant covenants and agrees that, where permitted by law, Tenant's pro-rata share of such taxes shall be passed on to and included in the bill of and paid by Tenant to Landlord.

16. Access to Premises.—Tenant shall permit Landlord to erect, use, and maintain, pipes and conduits in and through the demised premises. Landlord or Landlord's agents shall have the right to enter the demised premises at all times, to examine the same, and to show them to prospective purchasers or lessees of the building, and to make such decorations, repairs, alterations, improvements, or additions as Landlord may deem necessary or desirable, and Landlord shall be allowed to take all material into and upon said premises that may be required therefor without the same constituting an eviction of Tenant in whole or in part and the rent reserved shall in no wise abate while said decorations, repairs, alterations, improvements, or additions are being made, by reason

of loss or interruption of the business of Tenant because of the prosecution of any such work, or otherwise: During the six months prior to the expiration of the term of this lease, Landlord may exhibit the premises to prospective tenants, and place upon said premises the usual notices "To Let" or "For Sale," which notices Tenant shall permit to remain thereon without molestation. Landlord shall have the right to change the arrangement and/or location of entrances or passageways, doors and doorways, and corridors, elevators, stairs, toilets, or other public parts of the building, and after reasonable notice, to change the name, number, or designation by which the building is commonly known. Nothing herein contained, however, shall be deemed or construed to impose upon Landlord any obligation, responsibility, or liability whatsoever, for the care, supervision, or repair, of the building or any part thereof, other than as herein otherwise provided.

17. Vaults, Vault Space, Etc.—No vaults, vault space, or space not within the property line of the building is leased hereunder, anything contained in or indicated on any sketch, blueprint, or plan, or anything contained elsewhere in this lease to the contrary notwithstanding. Landlord makes no representation as to the location of the property line of the building. All vaults and vault space and all space not within the property line of the building, which Tenant may be permitted to use and/or occupy, is to be used and/or occupied under a revocable license, and if any such license be revoked, or if the amount of such space be curtailed by any federal, state, or municipal authority, Landlord shall not be subject to any liability nor shall Tenant be entitled to any compensation or diminution or abatement of rent, nor shall such revocation or curtailment be deemed a constructive or actual, total, or partial eviction.

18. Certificate of Occupancy.—Tenant will not at any time use or occupy the demised premises in violation of the certificate of occupancy issued for the building of which the demised premises form a part, and in the event that any department of the City or State of New York shall hereafter at any time contend and/or declare that the premises hereby demised are used for a purpose which is a violation of such certificate of occupancy, in that event Tenant shall, upon 5 days' written notice from Landlord, immediately discontinue such use of said premises. Failure by Tenant to discontinue such use after such notice shall be considered a default in the fulfillment of a covenant of this lease and Landlord shall have the right to terminate this lease immediately, and in

addition thereto shall have the right to exercise any and all rights and privileges and remedies given to Landlord by and pursuant to the provisions of Article 21 hereof. The statement in this lease of the nature of the business to be conducted by Tenant in demised premises shall not be deemed or construed to constitute a representation or guaranty by Landlord that such business is lawful or permissible under the certificate of occupancy issued for the building of which the demised premises form a part, or otherwise permitted by law.

19. Sprinklers.—If there now is or shall be installed in the building a "sprinkler system," and such system or any of its appliances shall be damaged or injured or not in proper working order by reason of any act of Tenant, Tenant's agents, servants, employees, licensees, or visitors, Tenant shall forthwith restore the same to good working condition; and if the New York Board of Fire Underwriters or the New York Fire Insurance Exchange or any bureau, department, or official of the state or city government, require or recommend that any changes, modifications, alterations, or additional sprinkler heads or other equipment, be made or supplied by reason of Tenant's business, or the location of partitions, trade fixtures, or other contents of the demised premises, or if any such changes, modifications, alterations, additional sprinkler heads or other equipment, become necessary to prevent the imposition of a penalty or charge against the full allowance for a sprinkler system in the fire insurance rate as fixed by said Exchange, or by any Fire Insurance Company, Tenant shall, at Tenant's expense, promptly make and supply such changes, modifications, alterations, additional sprinkler heads, or other equipment, Tenant shall pay to Landlord as additional rental the sum of * $..... on the first day of each month during the term of this lease, as Tenant's portion of the contract price for sprinkler supervisory service.

20. Bankruptcy.—If at any time during the term hereby demised, a petition shall be filed, either by or against Tenant, in any court or pursuant to any statute either of the United States or of the State of New York, whether in bankruptcy, insolvency, for the appointment of a receiver of Tenant's property, or because of any general assignment made by Tenant of Tenant's property for the benefit of Tenant's creditors, then immediately upon the happening of any such event, and without any entry or other act by Landlord, this lease shall expire, at the owner's option, cease, and come to

* Blank spaces to be filled in.

an end with the same force and effect as if the date of the happening of any such event were the date herein fixed for the expiration of the term of this lease. It is further stipulated and agreed that, in the event of the termination of the term of this lease by the happening of any such event, Landlord shall forthwith, upon such termination, and any other provisions of this lease to the contrary notwithstanding, become entitled to recover as and for liquidated damages caused by such breach of the provisions of this lease an amount equal to the difference between the then cash value of the rent reserved hereunder for the unexpired portion of the term hereby demised, and the then cash rental value of the demised premises for such unexpired portion of the term hereby demised, unless the statute which governs or shall govern the proceeding in which such damages are to be proved limits or shall limit the amount of such claim capable of being so proved, in which case Landlord shall be entitled to prove as and for liquidated damages an amount equal to that allowed by or under any such statute. The provisions of this paragraph of this lease shall be without prejudice to Landlord's right to prove in full damages for rent accrued prior to the termination of this lease, but not paid. This provision of this lease shall be without prejudice to any rights given to Landlord by any pertinent statute to prove for any amounts allowed thereby.

In making any such computation, the then cash rental value of the demised premises shall be deemed *prima facie* to be the rental realized upon any reletting, if such reletting can be accomplished by Landlord within a reasonable time after such termination of this lease, and the then present cash value of the future rents hereunder reserved to the Landlord for the unexpired portion of the term hereby demised shall be deemed to be such sum, if invested at four per cent (4%) simple interest, as will produce the future rent over the period of time in question.

21. Default.—(1) If Tenant shall make default in fulfilling any of the covenants of this lease other than the covenants for the payment of rent or additional rent, or if the demised premises become vacant or deserted, Landlord may give Tenant three days' notice of intention to end the term of this lease and thereupon, at the expiration of said three days (if said default continues to exist) the term under this lease shall expire as fully and completely as if that day were the day herein definitely fixed for the expiration of the term, and Tenant will then quit and surrender the demised premises

to Landlord but Tenant shall remain liable as hereinafter provided.

(2) If the notice provided for in (1) hereof shall have been given, and the term shall expire as aforesaid; or (2a) if Tenant shall make default in the payment of the rent reserved herein or any item of additional rent herein mentioned, or any part of either or in making any other payment herein provided; or (2b) if any execution or attachment shall be issued against Tenant or any of Tenant's property whereupon the demised premises shall be taken or occupied or attempted to be taken or occupied by someone other than Tenant; or (2c) if Tenant shall make default with respect to any other lease between Landlord and Tenant; or (2d) if Tenant shall fail to move into or take possession of the premises within fifteen (15) days after commencement of the term of this lease of which fact Landlord shall be the sole judge; then and in any of such events Landlord may without notice, re-enter the demised premises either by force or otherwise, and dispossess Tenant by summary proceedings or otherwise, and the legal representative of Tenant or other occupant of demised premises, and remove their effects and hold the premises as if this lease had not been made, and Tenant hereby waives the service of notice of intention to re-enter or to institute legal proceedings to that end.

Remedies of Landlord.—In case of any such default, re-entry, expiration and/or dispossess by summary proceedings or otherwise, (a) the rent shall become due thereupon and be paid up to the time of such re-entry, dispossess and/or expiration, together with such expenses as Landlord may incur for legal expenses, attorneys' fees, brokerage and/or putting the demised premises in good order, or for preparing the same for re-rental; (b) Landlord may re-let the premises or any part or parts thereof, either in the name of Landlord or otherwise, for a term or terms which may at Landlord's option be less than or exceed the period which would otherwise have constituted the balance of the term of this lease and may grant concessions or free rent; and/or (c) Tenant or the legal representatives of Tenant shall also pay Landlord as liquidated damages for the failure of Tenant to observe and perform said Tenant's covenants herein contained, any deficiency between the rent hereby reserved and/or covenanted to be paid and the net amount, if any, of the rents collected on account of the lease or leases of the demised premises for each month of the period which would otherwise have constituted the balance of the term of this lease. In computing such liquidated damages there

shall be added to the said deficiency such expenses as Landlord may incur in connection with re-letting, such as legal expenses, attorney's fees, brokerage and for keeping the demised premises in good order or for preparing the same for re-letting. Any such liquidated damages shall be paid in monthly installments by Tenant on the rent day specified in this lease and any suit brought to collect the amount of the deficiency for any month shall not prejudice in any way the rights of Landlord to collect the deficiency for any subsequent month by a similar proceeding. Landlord at Landlord's option may make such alterations and/or decorations in the demised premises as Landlord in Landlord's sole judgment considers advisable and necessary for the purpose of re-letting the demised premises; and the making of such alterations and/or decorations shall not operate or be construed to release Tenant from liability hereunder as aforesaid. Landlord shall in no event be liable in any way whatsoever for failure to re-let the demised premises, or in the event that the demised premises are re-let, for failure to collect the rent thereof under such re-letting. In the event of a breach or threatened breach by Tenant of any of the covenants or provisions hereof, Landlord shall have the right of injunction and the right to invoke any remedy allowed at law or in equity as if re-entry, summary proceedings and other remedies were not herein provided for. Mention in this lease of any particular remedy, shall not preclude Landlord from any other remedy, in law or in equity. Waiver of Redemption.—Tenant hereby expressly waives any and all rights of redemption granted by or under any present or future laws in the event of Tenant being evicted or dispossessed for any cause, or in the event of Landlord obtaining possession of demised premises, by reason of the violation by Tenant of any of the covenants and conditions of this lease, or otherwise.

22. Fees and Expenses.—If Tenant shall default in the performance of any covenant on Tenant's part to be performed by virtue of any provision in any article in this lease contained, Landlord may immediately, or at any time thereafter, without notice, perform the same for the account of Tenant. If Landlord at any time is compelled to pay or elects to pay any sum of money, or do any act which will require the payment of any sum of money, by reason of the failure of Tenant to comply with any provision hereof, or, if Landlord is compelled to incur any expense including reasonable attorney's fees in instituting, prosecuting and/or defending any action or proceeding instituted by reason of any default of Tenant hereunder, the sum or sums so paid by Landlord with all interest, costs, and dam-

ages, shall be deemed to be additional rent hereunder and shall be due from Tenant to Landlord on the first day of the month following the incurring of such respective expenses.

23. No Representations by Landlord.—Landlord or Landlord's agents have made no representations or promises with respect to the said building or demised premises except as herein expressly set forth. The taking possession of the demised premises by Tenant shall be conclusive evidence, as against Tenant, that said premises and the building of which the same form a part were in good and satisfactory condition at the time such possession was so taken.

24. End of Term.—Upon the expiration or other termination of the term of this lease, Tenant shall quit and surrender to Landlord the demised premises, broom clean, in good order and condition, ordinary wear excepted. Tenant shall remove all property of Tenant as directed by Landlord. Tenant's obligation to observe or perform this covenant shall survive the expiration or other termination of the term of this lease.

25. Quiet Enjoyment.—Landlord covenants and agrees with Tenant that upon Tenant paying said rent, and performing all the covenants and conditions aforesaid, on Tenant's part to be observed and performed, Tenant shall and may peaceably and quietly have, hold and enjoy the premises hereby demised, for the term aforesaid, subject, however, to the terms of the lease and of the ground leases, underlying leases and mortgages hereinbefore mentioned.

26. Failure to Give Possession.—If Landlord shall be unable to give possession of the demised premises on the date of the commencement of the term hereof by reason of the fact that the premises are located in a building being constructed and which has not been sufficiently completed to make the premises ready for occupancy or by reason of the fact that a certificate of occupancy has not been procured or for any other reason, Landlord shall not be subject to any liability for the failure to give possession on said date. Under such circumstances the rent reserved and covenanted to be paid herein shall not commence until the possession of demised premises is given or the premises are available for occupancy by Tenant, and no such failure to give possession on the date of commencement of the term shall in anywise affect the validity of this lease or the obligations of Tenant hereunder, nor shall same be construed in anywise to extend the term of this lease. If the building in which the demised premises are located is not in course of construction, and Landlord is unable to give possession of the demised premises on the date of the commencement of the term hereof

by reason of the holding over of any tenant or tenants or for any other reason; or if repairs, improvements, or decorations of the demised premises or of the building in which said premises are located, are not completed, no abatement or diminution of the rent to be paid hereunder shall be allowed to Tenant under such circumstances. If permission is given to Tenant to enter into the possession of the demised premises or to occupy premises other than the demised premises prior to the date specified as the commencement of the term of this lease, Tenant covenants and agrees that such occupancy shall be deemed to be under all the terms, covenants, conditions, and provisions of this lease, except as to the covenant to pay rent. In either case rent shall commence on the date specified in this lease.

27. No Waiver.—If there be any agreement between Landlord and Tenant providing for the cancellation of this lease upon certain provisions or contingencies, and/or an agreement for the renewal hereof at the expiration of the term first above mentioned, the right to such renewal or the execution of a renewal agreement between Landlord and Tenant prior to the expiration of such first-mentioned term shall not be considered an extension thereof or a vested right in Tenant to such further term, so as to prevent Landlord from cancelling this lease and any such extension thereof during the remainder of the original term hereby granted; such privilege, if and when so exercised by Landlord, shall cancel and terminate this lease and any such renewal or extension previously entered into between said Landlord and Tenant or the right of Tenant to any such renewal; any right herein contained on the part of Landlord to cancel this lease shall continue during any extension or renewal hereof; any option on the part of Tenant herein contained for an extension or renewal hereof shall not be deemed to give Tenant any option for a further extension beyond the first renewal or extended term. No act or thing done by Landlord or Landlord's agents during the term hereby demised shall constitute an eviction by Landlord, nor shall be deemed an acceptance of a surrender of said premises, and no agreement to accept such surrender shall be valid unless in writing signed by Landlord. No employee of Landlord or of Landlord's agents shall have any power to accept the keys of said premises prior to the termination of the lease. The delivery of keys to any employee of Landlord or of Landlord's agents shall not operate as a termination of the lease or a surrender of the premises. In the event of Tenant at any time desiring to have Landlord sublet the premises for Tenant's account, Landlord or Landlord's agents are authorized to receive said keys for such pur-

poses without releasing Tenant from any of the obligations under this lease, and Tenant hereby relieves Landlord of any liability for loss of any of Tenant's effects or the happening of any other event in connection with such subletting. The failure of Landlord to seek redress for violation of, or to insist upon the strict performance of, any covenant or condition of this lease, or any of the rules and regulations set forth on the back of this lease or hereafter adopted by Landlord, shall not prevent a subsequent act, which would have originally constituted a violation, from having all the force and effect of an original violation. The receipt by Landlord of rent with knowledge of the breach of any covenant of this lease, shall not be deemed a waiver of such breach. The failure of Landlord to enforce any of the Rules and Regulations set forth on the back of this lease, or hereafter adopted, against Tenant and/or any other tenant in the building shall not be deemed a waiver of any such Rules and Regulations. No provision of this lease shall be deemed to have been waived by Landlord, unless such waiver be in writing signed by Landlord. No payment by Tenant or receipt by Landlord of a lesser amount than the monthly rent herein stipulated shall be deemed to be other than on account of the earliest stipulated rent, nor shall any endorsement or statement on any check nor any letter accompanying any check or payment as rent be deemed an accord and satisfaction, and Landlord may accept such check or payment without prejudice to Landlord's right to recover the balance of such rent or pursue any other remedy in this lease provided.

28. Bills and Notices.—Except as otherwise in this lease provided, a bill, statement, notice, or communication which Landlord may desire or be required to give to Tenant, including any notice of expiration, shall be deemed sufficiently given or rendered if, in writing, delivered to Tenant personally or sent by registered mail addressed to Tenant at the building of which the demised premises are a part or left at said premises addressed to Tenant, and the time of the rendition of such bill or statement and of the giving of such notice or communication shall be deemed to be the time when the same is delivered to Tenant, mailed, or left at the premises as herein provided. Any notice by Tenant to Landlord must be served by registered mail addressed to Landlord at the address where the last previous rental hereunder was paid.

29. Definitions.—The term "Landlord" as used in this lease means only the owner for the time being of the land and building (or the owner of a lease of the building) of which the demised premises form a part, so that in the event of any sale or

sales of said land and building or of said lease, or in the event of a lease of said building, the said Landlord shall be and hereby is entirely freed and relieved of all covenants and obligations of Landlord hereunder, and it shall be deemed and construed without further agreement between the parties or their successors in interest, or between the parties and the purchaser, at any such sale, or the said lessee of the building, that the purchaser or the lessee of the building has assumed and agreed to carry out any and all covenants and obligations of Landlord hereunder. The words "re-enter" and "re-entry" as used in this lease are not restricted to their technical legal meaning.

30. Marginal Notes.—The marginal notes are inserted only as a matter of convenience and for reference and in no way define, limit, or describe the scope or intent of this lease nor in any way affect this lease.

31. The covenants, conditions, and agreements contained in this lease shall bind and inure to the benefit of Landlord and Tenant and their respective heirs, executors, administrators, successors, and, except as otherwise provided in this lease, their assigns.

32. Waiver of Jury Trial.—It is mutually agreed by and between Landlord and Tenant that in any action or proceeding brought by either of the parties hereto against the other on any matters whatsoever arising out of, under, or by virtue of the terms of this lease that the respective parties hereto shall and they hereby do waive trial by jury.

Special articles not provided in standard form of loft lease, but forming a part hereof.

The additional clauses appearing on the attached supplementary sheet are to be considered part of this lease.

In Witness Whereof, Landlord and Tenant have respectively signed and sealed this lease as of the day and year first above written.

ARSENAL BUILDING CORPORATION,

By: ——— ———, [L. S.]

President.

MAX WIESEN & SONS CO., INC.,

By: ——— ———, [L. S.]

Witness for Landlord:

——— ———

Witness for Tenant:

——— ———

Rider and Additional Clauses

Attached to and forming part of lease dated January 22, 1940, between Arsenal Building Corporation as Landlord and Max Weisen & Sons Co., Inc., as Tenant, for the entire 21st floor as per diagram, at 463—7th Avenue, N. Y. C.

33. The Landlord agrees, at its expense, to remove certain walls and erect new walls and install freight doors as designated on plan attached hereto. The Landlord also agrees at its expense, to kalsomine the walls and ceiling in the easterly portion of the premises now occupied by Rona-Dresses.

34. The Tenant shall use and occupy the demised premises for the manufacture and sale of dresses in accordance with the Zoning Regulations of the City of New York; said manufacture not to be conducted on more than twenty-five (25%) per cent of the entire space occupied by the Tenant in the building of which the demised premises form a part.

35. Nothing herein contained shall be construed so as to obligate the Tenant herein to make any structural repairs; nor shall anything contained herein be construed so as to relieve the Landlord from using reasonable care and diligence in the operation of the building of which the demised premises form a part.

36. Before the Landlord makes any repairs or alterations in the demised premises at the expense of the Tenant (other than emergency repairs) the Landlord shall give the Tenant at least five (5) days' notice in writing of its intention to do so in order to enable the Tenant to arrange for the making of such repairs or alterations instead of the Landlord.

37. The Landlord agrees that it will not unreasonably withhold its consent to sublet the demised premises or to assign this lease.

38. If either the Landlord or the Tenant becomes involved in any litigation arising out of this lease, neither of the parties shall be obligated to pay the legal fees, costs, or disbursement of the other party other than those fixed by statute; nor shall either the Landlord or the Tenant be required to waive trial by jury, anything in this lease contained to the contrary notwithstanding.

Arsenal Building Corporation,

By: ———————,

Landlord.

Max Wiesen & Sons Co., Inc.,

By: ———————,

Tenant.

2/3/40.

Spear & Co., Inc., New York City

LEASE RECEIPT

Please Sign Promptly and Return

Received from Spear & Co., Inc., agent duly executed tenant's copy of lease between Arsenal Building Corporation as landlord and Max Wiesen & Sons Co., Inc., as tenant, covering 21st floor in building No. 463 Seventh Avenue, New York City, from 2/1/41 to 1/31/42.

MAX WIESEN & SONS CO.,
Tenant.

By FAY SIMS.

JANUARY 29, 1940.

MAX WIESEN & SONS CO., INC.,
463 Seventh Avenue, New York, N. Y.

GENTLEMEN: As a further inducement to your signing lease dated January 22, 1940, for the entire twenty-first floor in the building 463 Seventh Avenue, beginning as of February 1, 1941, and ending January 31, 1942, we hereby agree at the beginning of the term of the above lease to create or install enough A. C. current in these premises to make it possible that all machinery and lights, etc., shall be run under A. C. current.

Yours very truly,

ARSENAL BUILDING CORPORATION,
By LEON R. SPEAR,
Secretary.

LRS:MJR

RULES AND REGULATIONS

1. The sidewalks, entrances, passages, courts, elevators, vestibules, stairways, corridors, or halls shall not be obstructed or encumbered by any Tenant or used for any purpose other than ingress and egress to and from the demised premises, and if said premises are situate on the ground floor of the building the Tenant thereof shall further, at said Tenant's own expense, keep the sidewalks and curb directly in front of said premises clean and free from ice, snow, etc.

2. The freight and not the passenger elevators shall be used by the working hands of the Tenant and by persons calling for and delivering goods to and from the demised premises.

3. No awnings or other projections shall be attached to the outside walls of the building without the prior written consent of the Landlord. No curtains, blinds, shades, or screens shall be attached to or hung in, or used in connection with, any window or door of the demised premises, without the prior written consent of the Landlord. Such awnings, projections, curtains, blinds, shades, screens, or other fixtures must be of a quality, type, design and color, and attached in the manner approved by the Landlord.

4. No sign, advertisement, notice, or other lettering shall be exhibited, inscribed, painted, or affixed by any Tenant on any part of the outside or inside of the demised premises or building without the prior written consent of the Landlord. Interior signs on doors shall be inscribed, painted, or affixed for each Tenant by the Landlord at the expense of such Tenant, and shall be of a size, color, and style acceptable to the Landlord.

5. The sashes, sash doors, skylights, windows, and doors that reflect or admit light and air into the halls, passageways, or other public places in the building shall not be covered or obstructed by any Tenant, nor shall any bottles, parcels, or other articles be placed on the windowsills.

6. The water and wash closets and other plumbing fixtures shall not be used for any purposes other than those for which they were constructed, and no sweepings, rubbish, rags, or other substances shall be thrown therein. All damages resulting from any misuse of the fixtures shall be borne by the Tenant who, or whose servants, employees, agents, visitors, or licensees shall have caused the same.

7. No Tenant shall mark, paint, drill into, or in any way deface any part of the demised premises or the building of which they form a part. No boring, cutting, or stringing of wires shall be permitted, except with the prior written consent of the Landlord, and as the Landlord may direct. No Tenant shall lay linoleum, or other similar floor covering, so that the same shall come in direct contact with the floor of the demised premises, and, if linoleum or other similar floor covering is desired to be used an interlining of builder's deadening felt shall be first affixed to the floor, by a paste or other material, soluble in water, the use of cement or other similar adhesive material being expressly prohibited.

8. No Tenant shall make, or permit to be made, any unseemly or disturbing noises or disturb or interfere with occupants of this or neighboring buildings or premises or those having business with them whether by the use of any musical instrument, radio, talking machine, unmusical noise, whistling, singing, or in any other way.

9. No Tenant, nor any of Tenant's servants, employees, agents, visitors, or licensees shall at any time bring or keep upon the demised premises any inflammable, combustible, or explosive fluid, chemical, or substance, or cause or permit any unusual or objectionable odors to be produced upon or permeate from the demised premises.

10. No Tenant shall place a load upon any floor of the building exceeding the floor load per square foot area which such floor was designed to carry, and all floor loads shall be evenly distributed. All removals, or the carrying in or out of any safes, freight, furniture, or bulky matter of any description must take place during the hours which the Landlord or Landlord's agent may determine from time to time. The Landlord reserves the right to prescribe the weight and position of all safes, which must be placed so as to distribute the weight. The Landlord reserves the right to inspect all freight to be brought into the building and to exclude from the building all freight which violates any of these Rules and Regulations or the lease of which these Rules and Regulations are a part.

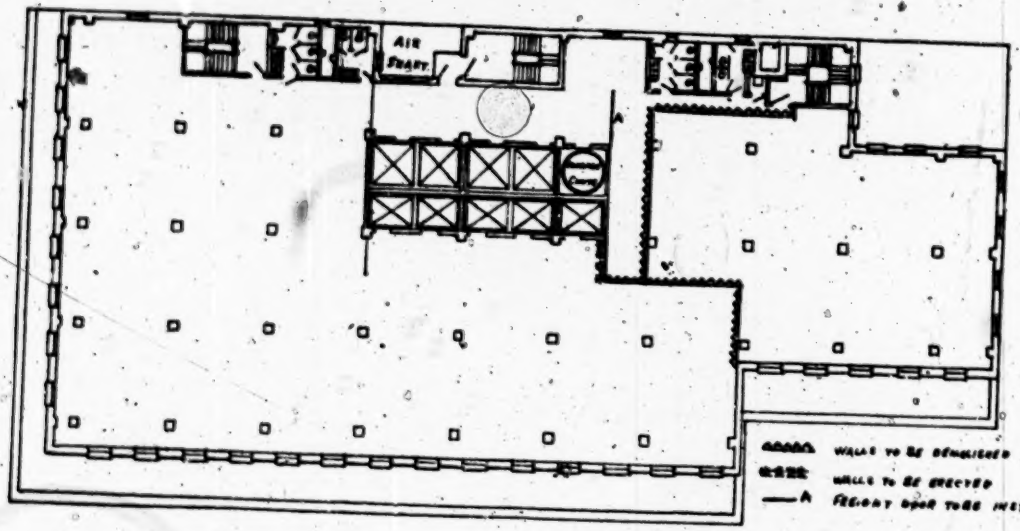
11. All machinery shall be placed by the Tenant in the demised premises in approved settings to absorb or prevent any vibration, noise, or annoyance.

12. The Landlord shall have the right to prohibit any advertising by any Tenant which, in its opinion, tends to impair the reputation of the building or its desirability as a building for lofts, and upon written notice from the Landlord, Tenants shall refrain from or discontinue such advertising.

13. Any person employed by any Tenant to do janitor work shall, while in said building and outside of said demised premises, be subject to, and under the control and direction of the Superintendent of said building (but not as agent or servant of said Superintendent or of the Landlord).

14. Canvassing, soliciting, and peddling in the building is prohibited and each Tenant shall cooperate to prevent the same.

15. There shall not be used in any space, or in the public halls of any building, either by any Tenant or by jobbers or others, in the delivery or receipt of merchandise, any hand trucks, except those equipped with rubber tires and side guards.



SPEAR & CO. 463 SEVENTH AVE. CORNER 35TH ST.

1/8 INCH = 1 FOOT | 19-20 W. 21ST FLOOR PLAN | 1ST FLOOR PLAN

Plaintiff's Exhibit 25

SUMMARY OF BUSINESS CONDUCTED BY TENANTS IN ARSENAL BUILDING, 463 7TH AVENUE, NEW YORK, N. Y.

Tenants Engaged in Producing and Selling Dresses

Tenant	Floor	Type of business				Contractors outside N. Y. 1940 (*1939) (**1941)	Inter-state sales 1940 (*1939) (**1941)	Gross sales 1940 (*1939) (**1941)	Gross sales outside N. Y. 1940 (*1939) (**1941)	Returns outside N. Y. 1940 (*1939) (**1941)	Pay roll 1940 (**1941)	Present number of employees
		Manufacturer			Jobber							
		Samples	Cutting	Sewing								
Totals	47 22	41	35	9	4	2,149,665.83	0.82	28,966,902.50	23,773,564.22	2,913,715.98	3,230,869.17	2,026
Spear & Company, Inc.	22	Real Estate Office										
11 thru 17												
Max Wiesen & Sons Co., Inc.		X	X	X		none	.85	*4,872,708.00	*4,170,007.20	*1,196,807.20	1,272,583.36	700
15th floor												
Max Wiesen & Sons Co., Inc.	½											
16th floor												
Maywine Frock, Inc.	¼	X	X			75,206.80	.80	376,788.55	302,092.44	25,919.49	31,459.75	15
Plutzer & Bloomberg, Inc.	1/16	X	X			none	.80	456,453.44	365,162.75	37,345.00	45,406.74	18
Sheldae Jrs., Inc	1/16	X	X (New tenant 2/24/41)			**none	**.50	**8,000.00	**4,000.00	**400.00	**1,400.00	10
Chic Dance Frocks	¼	X	X (New tenant 1/41)			**none	**.35	**5,000.00	**1,750.00	**35.00	**1,600.00	6
15th floor												
Festival Dance Frocks	½	X	X			16,153.31	.57	343,153.14	194,567.83	20,187.61	18,818.35	28
17th floor												
Louis Lipshitt Dress Corp	¼	X	X (New tenant 2/41)			**none	**.90	**11,000.00	**9,900.00	**270.00	**2,200.00	8
Art Frocks, Inc	¼	X	X (New tenant 2/1/41)			**2,000.00	**.75	**6,011.81	**4,508.86	**none	**2,645.74	18
Rona Dresses, Inc	¼	X	X			121,245.28	.75	804,831.85	603,623.89	48,289.91	54,104.17	28
Abbington Frocks	¼				X		.78	*112,449.72	*87,924.84	*10,202.03	4,652.00	3

15th floor										
Peggy Parker, Jr., Inc.	¼	X	X (New tenant 8/1/40)	2,692.87	.91	99,634.40	90,558.63	10,493.80	9,797.18	10
Peggy Post, Jr., Inc.	¼	X	X (New tenant 11/1/40)	20,000.00	.82	59,166.84	48,503.91	3,253.00	5,165.00	16
Marco Dress	⅛		X	none	.90	*115,501.13	*103,675.25	*8,533.22	2,257.00	2
Chelsea Dress Corp.	⅛	show-room	(New tenant 8/40)	19,205.64	.84	92,822.08	77,772.00	5,224.00	4,069.29	6
Sheldon Dress Co., Inc.	¼	X	X X	none	.80	647,329.11	517,863.28	39,801.28	113,627.04	75
12th floor										
(Not occupied)	3/16									
Max Schneck & Bros.	9/16	X	X X	none	*.86	*1,556,758.83	*1,347,272.12	*47,989.15	477,340.55	310
11th floor										
Max Schneck & Bros.										
10th floor										
Sam Newman, Inc.	⅛	X	X	none	.75	1,325,000.00	993,750.00	20,000.00	41,570.00	25
M. Mintz, Inc.	⅛	X	X	59,719.04	.82	287,814.37	235,000.00	35,000.00	23,281.97	10
Baltimore Dress Co.	3/16	X		245,860.27	.80	1,356,481.43	1,082,336.50	57,539.56	22,217.47	8
Myra Dress Co., Inc.	⅛	X		none	.75	152,000.00	114,000.00	11,400.00	6,500.00	4
9th floor										
Joseph Fell, Inc.	½	X	X X	41,412.27	.72	1,065,071.24	766,851.29	52,485.52	73,350.57	24
Varsity Sportswear	½	X	X	115,881.80	.90	1,550,710.87	1,395,639.78	85,758.71	69,609.84	40
8th floor										
National Garment	½	X		50,297.00	.75	1,786,056.71	1,345,200.37	97,089.85	64,777.94	28
Morstyle Frock, Inc.	⅛	X	X X	none	.83	300,000.00	250,000.00	30,000.00	98,000.00	90
Serenade Dance Frocks	⅛	X		8,800.00	.95	185,852.00	176,867.20	17,600.00	12,975.00	6
7th floor										
(Not occupied)	¼									
Nu Blu Frocks	⅛	X	X (New tenant 2/40)	none	.67	347,732.33	231,833.14	14,423.92	28,130.48	11
Lassie Frocks, Inc.	¼	X	X X	none	.90	252,052.49	226,847.24	30,080.97	77,331.18	65
Delro Dresses, Inc.	⅛	X		5,000.00	.85	875,000.00	743,750.00	22,312.00	40,000.00	13
Rio Rita Dance Frocks, Inc.	⅛	X	(New tenant 2/6/41)	none	**.90	**5,076.00	**4,568.40	**155.74	**1,415.83	6
6th floor										
Dormoe Dress, Inc.	5/16	X	X X	900.25	.96	311,939.54	300,000.00	25,000.00	114,532.30	85
Gilt Jr. Dress Corp.	5/16	X	X X	2,160.91	.88	198,285.08	175,000.00	20,000.00	68,179.20	65
Sportland Modes, Inc.	¼	X	X	63,115.23	.94	296,412.40	280,369.66	14,241.86	40,062.53	15
Fern Frocks	⅛	X	X (part of X Delro Dresses)							

Plaintiff's Exhibit 25—Continued

SUMMARY OF BUSINESS CONDUCTED BY TENANTS IN ARSENAL BUILDING, ETC.—Continued

Tenants Engaged in Producing and Selling Dresses

Tenant	Floor	Type of business: Manufacturer: Samples	Type of business: Manufacturer: Cutting	Type of business: Manufacturer: Sewing	Type of business: Jobber	Contractors outside N. Y. 1940 (*1939) (**1941)	Inter-state sales 1940 (*1939) (**1941)	Gross sales 1940 (*1939) (**1941)	Gross sales outside N. Y. 1940 (*1939) (**1941)	Returns outside N. Y. 1940 (*1939) (**1941)	Pay roll 1940 (**1941)	Present number of employees
8th floor												
Flora Dora Costume Co	8½	X	X			352.45	.90	682,757.42	614,481.68	6,144.81	69,445.56	29
Penny Pepper, Inc	¼	X	X	(New tenant 12/1/40)		**3,770.00	.80	**110,950.00	**88,760.00	**7,040.00	**6,787.00	20
Nu Belle	¼	X	X	X		none	.99	199,776.74	197,778.97	5,933.00	42,838.93	39
Lamour Frock, Inc	¼	X	X			none	.90	373,389.77	336,050.80	36,000.00	15,540.27	17
4th floor												
S. Schwartz & Bro	3/4	X	X			289,644.59	.60	1,068,223.97	640,934.34	60,000.00	40,858.31	23
Hi Style Dresses, Inc	¼	X	X	(New tenant 3/4/40)		none	.72	254,753.19	183,422.30	18,342.00	19,695.10	11
Chas. Goldman, Inc	¼	X	X			6,445.15	.75	100,000.00	75,000.00	6,000.00	15,587.14	6
(Not occupied)	¼											
3rd floor												
Jo-El Dress Co., Inc	½	X	X			449,067.19	.81	2,561,468.19	2,085,407.16	150,000.00	82,354.25	34
Kaplan & Elias	½	X	X			282,135.78	.86	1,525,949.32	1,322,234.70	51,042.42	45,320.85	23
2nd floor												
Harry H. Greenberg, Inc	½	X	X			120,000.00	.71	797,775.62	565,389.34	33,948.19	38,314.82	50
Royal Frocks, Inc	¾	showroom				148,000.00	.99	1,424,000.36	1,409,760.30	51,423.00	24,000.00	15
Rocket Dress, Inc	¼	X	X	(New tenant 12/17/40)		600.00	.67	4,704.56	3,148.05	56.09	1,066.46	11
Store and Basement												
Harry Meirowitz Bros., Inc.[1]	piece goods dyed outside N. Y. 1,039,000.00							1,077,500.00	200,000.00	5,000.00	61,500.00	13
Ground floor												
Major Trucking[1]	trucking company											

[1] The business done by these tenants is not included in the total figures.

Plaintiff's Exhibit 28

Spear & Co., Real Estate, 225 Fifth Avenue, New York. Telephone Ashland 4–4200. Rent bill. Please return duplicate stub with your check to insure proper credit to your account.

Paid. Check #261. Bank Mfrs. Date 3/15/41. Max Schneck & Bros., Inc. 11th. By S. B. Schneck Bros., 463–7th Ave., N. Y. C. For month of Mar. 1941, 847.34.

Plaintiff's Exhibit 29

SPEAR & COMPANY, INC.
225 Fifth Avenue, New York, New York

Electric Service—

Meter No.	Period of bill	Demand kw.	Meter readings		C	Total kw. hrs.	Energy charge	Demand charge	3% N.Y.C. sales tax for relief of unemployment	Amount of bill including tax
			Present	Previous						
J1758	Aug. 20–Sep. 20 '40		4,626	2,820		1,806				
J13109			4,825	2,973		1,852				
J12143			10,771	9,297		1,474				
J831			4,556	3,850		706				
J1632			11,518	9,525		1,993				
5900N			2,007	1,946	10	610				
J1647			3,201	2,412		789				
J13707			8,761	4,559		4,202				
						13,432	602.20		E	602.20

S. C. No. 2 General Rate—Light, Heat, and Power (Schedule on Reverse Side).

MAX SCHNECK & BROS., INC.,
463 Seventh Ave., 12th Fl. E.—New York City. W.—11th Fl.

Paid. Check, # 1834. Bank, Chase. Date, 10/9/40. 18/1000 ¢ Max Schneck & Bros, Inc. By P. S.

MONTHLY RATE SCHEDULE

Service Classification No. 2

Minimum charge—
$.90 per month.
Demand charge—

First 3 Kw. of maximum demand	Included in the energy charge
Next 12 Kw. of maximum demand	$2.50 per Kw. per month
Next 985 Kw. of maximum demand	$2.00 per Kw. per month
Next 1000 Kw. of maximum demand	$1.75 per Kw. per month
All over 2000 Kw. of maximum demand	$1.50 per Kw. per month

Energy charge—

First 10 Kwh. (or less) per month	$.90 per month
Next 70 Kwh. of monthly consumption	5.5¢ per Kwh.
Next 720 Kwh. of monthly consumption	5.0¢ per Kwh.
Next 5200 Kwh. of monthly consumption	4.0¢ per Kwh.
Next 24000 Kwh. of monthly consumption	1.3¢ per Kwh.
Next 150000 Kwh. of monthly consumption	1.0¢ per Kwh.
All over 180000 Kwh. of monthly consumption	0.7¢ per Kwh.

Addition or deduction according to changes in cost of fuel as per rate schedule filed with the Public Service Commission (Included in Item marked*).

SPECIAL PROVISIONS

The above rates shall not be applied or billed so as to increase any monthly bill of any customer above the total amount which such customer would have been billed if bills had been rendered at the demand and energy charges in effect prior to August 1, 1935 (including also the addition or deduction for changes in cost of fuel), viz:

Minimum charge—
One dollar ($1.00) per meter per month.

Energy charge—

First 10 Kwh. (or less) per meter per month	$1.00 per meter per month
Next 40 Kwh. per meter per month	6¢ per Kwh
Next 450 Kwh. per meter per month	5¢ per Kwh.
All over 5000 Kwh. per meter per month	4¢ per Kwh.

Demand charge—
One Dollar ($1.00) per month per Kw. of maximum demand, where the demand exceeds one kilowatt.

Plaintiff's Exhibit 31

This Agreement, made this twenty-third day of January, 1928, between Seventh Ave. & 35th St. Corporation, a domestic corporation hereinafter termed the Owner, and Spear & Co., Inc., a domestic corporation, hereinafter termed Agent, witnesseth

Whereas the Owner is seized of the property known as No. 463-467 Seventh Avenue in the Borough of Manhattan, City of New York, and

Whereas the Agent is engaged in the management of Real Estate and general Real Estate brokerage business in the City of New York; and,

Whereas the Owner is desirous of engaging the services of the Agent as sole agent in the manner and upon the terms hereinafter set forth,

Now therefore in consideration of the premises and the sum of One ($1.00) Dollar, the receipt of which is hereby acknowledged, and other good and valuable considerations, the parties hereto have agreed as follows:

First. The Owner does hereby employ and retain the Agent as sole agent for and in connection with the aforesaid property for the term beginning the first day of February, 1928, and to end on the thirty-first day of January, 1929.

Second. It is further understood and agreed that all applications for space in the said building are to be referred to the Agent, it being the intention that all leases and other arrangements for occupancy in the said building or portions thereof, shall be referred to and closed by the Agent, the Owner hereby conferring the necessary authority to Agent for the purposes aforesaid, and the Agent shall receive a stipulated commission therefor, as hereinafter set forth.

Third. The Owner agrees to pay the Agent the usual and customary commission in vogue at the time of making leases for space in said building as promulgated by the Real Estate Board of New York; if a lease be made by a broker other than the Agent, then this broker shall be compensated out of the commission, as above set forth, as and when the same is received by the Agent and no additional charge shall be made by the Agent to the Owner.

• • • • •

Fifth. It is agreed that all commissions that become due hereunder to the Agent, shall in each instance be paid when the leases have been executed.

• • • • •

Seventh. It is further understood and agreed that the Agent shall employ the necessary help, make all necessary purchases, advertise when necessary, contract for and make necessary repairs and the payment therefor, and pay for all expenses in relation to the operation and maintenance of the building for the account of the Owner, such expenses to be deducted monthly and vouchers therefor shall accompany each monthly statement.

Eighth. The Agent is hereby authorized to take any action at law or equity which it should deem necessary or appropriate for the purpose of enforcing collection of money due from tenants or to repossess any portion of the premises which may be necessary or convenient for the management thereof.

• • • • •

Twelfth. The Owner further agrees to pay the Agent the sum of Ten thousand (10,000) Dollars per annum, payable in monthly installments which shall be deducted each month; a statement shall be rendered by the Agent to the Owner,

which shall show all income and disbursements, and a check for the balance shall be submitted by the Agent to the Owner; for the aforesaid charge the Agent hereby agrees to collect the rent and otherwise generally manage the property.

This agreement shall bind and benefit the personal representatives, successors, and assigns of the parties.

In Witness Whereof, the parties hereto have executed, or caused to be executed, these presents by the properly authorized parties and the appropriate seals thereto duly affixed, the day and year first above written.

SPEAR & CO., INC.,
By AARON RABINOWITZ,
Pres.

SEVENTH AVE. & 35TH ST. CORPORATION,
By HARRY H. GREENBURG,
Treas.

Witness:

_____ _____,
As to Owner.

_____ _____,
As to Agent.

No. 463–7 Seventh Avenue. Seventh Ave. & 35th St. Corp., owner. Agency Contract. Begins February 1st, 1928. Expires January 31st, 1929. Spear & Co., Real Estate, 1261 Broadway, New York City.

Plaintiff's Exhibit 47

Pick-up count—463 7th Avenue, year 1940

Month	Shipts.	Pieces	Month	Shipts.	Pieces
January	23,411	25,099	July	21,302	*10,202
February	26,624	28,213	August	33,574	
March	29,251	31,201	September	35,544	
April	27,637	29,902	October	27,559	
May	31,047	34,794	November	24,031	
June	31,293	33,673	December	21,260	

*1st fifteen days

Plaintiff's Exhibit 48

Delivery count—463 7th Ave., year 1940

Month	Shipts.	Pieces	Month	Shipts.	Pieces
January	4,527	4,766	July	3,998	4,093
February	6,150	6,390	August	3,747	
March	5,902	6,017	September	6,998	
April	5,628	5,729	October	6,117	
May	6,377	6,451	November	5,284	
June	6,094	6,325	December	5,631	

Plaintiff's Exhibit 49

Delivery count—463 7th Avenue

January 1938			February 1938		
Date	Shipments	Pieces	Date	Shipments	Pieces
3rd	212	219	1st	165	173
4th	148	159	2nd	120	132
5th	54	54	3rd	132	139
6th	118	120	4th	150	154
7th	121	121	5th	133	142
8th	103	113	7th	201	209
10th	220	230	8th	153	161
11th	106	109	9th	89	93
12th	102	104	10th	134	141
13th	118	125	11th	170	176
14th	132	140	12th	175	177
15th	107	111	14th	193	207
17th	183	190	15th	161	161
18th	113	116	16th	134	135
19th	97	118	17th	172	179
20th	165	204	18th	173	184
21st	131	134	19th	132	134
22nd	120	125	21st	183	183
24th	203	217	23rd	181	186
25th	134	141	24th	172	185
26th	94	102	25th	213	228
27th	167	182	26th	125	128
28th	154	160	28th	203	207
29th	102	104			
31st	204	215			
Total	3,408	3,613	Total	3,664	3,814

Plaintiff's Exhibit 50

Delivery count—463 7th Avenue

January 1939			February 1939		
Date	Shipments	Pieces	Date	Shipments	Pieces
3rd	228	234	1st	20	25
4th	176	181	2nd	25	25
5th	159	158	3rd	12	12
6th	161	166	4th	140	140
7th	126	127	6th	496	517
9th	203	209	7th	171	181
10th	166	177	8th	122	124
11th	113	115	9th	112	124
12th	195	239	10th	195	203
13th	159	162	11th	112	112
14th	131	139	13th	203	207
16th	224	227	14th	189	194
17th	163	175	15th	105	118
18th	115	120	16th	170	174
19th	193	205	17th	211	223
20th	217	237	18th	130	140
21st	179	182	20th	288	304
23rd	208	222	21st	230	243
24th	235	242	23rd	273	286
25th	195	206	24th	180	192
26th	236	242	25th	157	160
27th	171	174	27th	335	348
28th	133	141	28th	226	238
30th	222	229			
31st	210	217			
Total	4,510	4,722	Total	4,102	4,250

Plaintiff's Exhibit 51

Pick-up count—463 7th Ave.

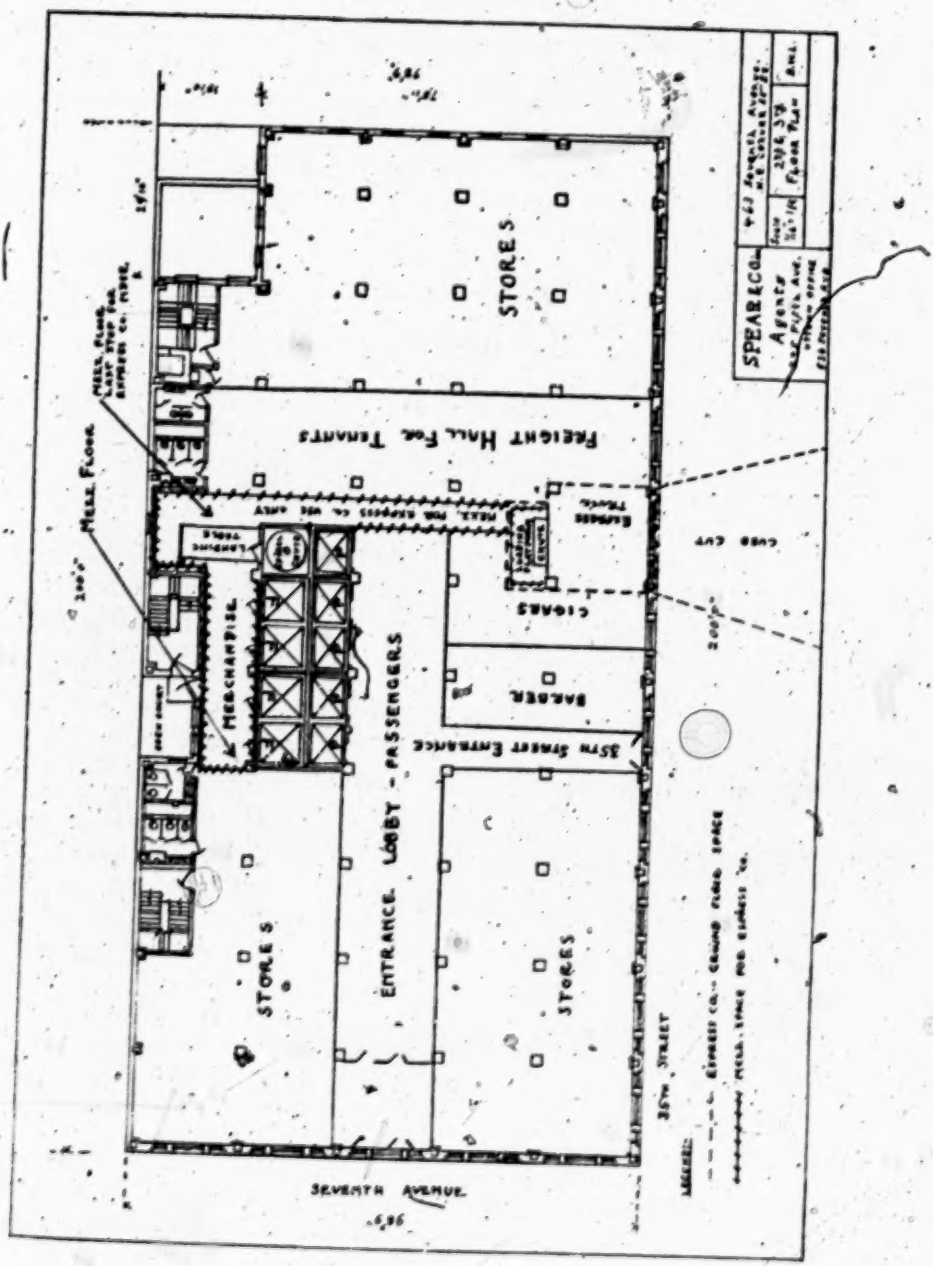
January 1939			February 1939		
Date	Shipments	Pieces	Date	Shipments	Pieces
3rd	517	595	1st	759	869
4th	487	535	2nd	469	600
5th	644	774	3rd	355	455
6th	623	713	4th	424	470
7th	1,045	1,133	6th	309	351
8th	382	423	7th	548	636
10th	471	568	8th	505	580
11th	573	629	9th	717	778
12th	495	605	10th	421	489
13th	573	610	11th	1,013	1,071
14th	897	1,000	13th	298	338
16th	431	465	14th	1,005	1,066
17th	900	1,063	15th	543	592
18th	758	841	16th	607	661
19th	668	755	17th	441	481
20th	629	654	18th	982	1,054
21st	1,313	1,441	20th	472	509
23rd	787	851	21st	777	873
24th	847	960	23rd	572	678
25th	557	674	24th	618	674
26th	743	875	25th	1,038	1,130
27th	573	605	27th	451	500
28th	1,265	1,387	28th	424	475
30th	442	512			
31st	1,260	1,372	Total	13,718	15,263
Total	17,879	20,060			

Plaintiff's Exhibit 52

Pick-up count—463 7th Ave.

January 1938			February 1938		
Date	Shipts.	Pieces	Date	Shipts.	Pieces
3rd	175	210	1st	740	810
4th	484	527	2nd	453	501
5th	382	490	3rd	581	679
6th	360	441	4th	594	678
7th	335	382	5th	671	685
8th	629	655	7th	554	606
10th	2	340	8th	362	451
11th	385	439	9th	566	602
12th	541	602	10th	514	589
13th	510	579	11th	595	649
14th	456	498	12th	457	465
15th	403	419	14th	444	462
17th	450	488	15th	478	549
18th	428	456	16th	728	797
19th	385	442	17th	655	740
20th	454	496	18th	702	806
21st	400	507	19th	550	594
22nd	434	449	21st	570	656
24th	467	567	23rd	667	754
25th	474	569	24th	709	767
26th	410	494	25th	671	758
27th	673	761	26th	632	678
29th	515	588	28th	534	574
30th	717	[illegible]			
31st	498	498	Total	13,504	14,844
Total	11,247	12,650			

Defendant's Exhibit "a"



[CAPTION]

Findings of fact and conclusions of law

On final hearing of a cause seeking to enjoin the defendants from violating the provisions of Section 15(a)(2) of the Fair Labor Standards Act of 1938, passed June 25, 1938, Title 29, United States Code, Sections 201 to 219.

WOOLSEY, J.: This cause on this day, Friday, April 4, 1941, after the trial had been completed, came on further to be heard and was argued by counsel.

Thereafter, on due consideration thereof, I make the following findings of fact and conclusions of law therein:

Findings of fact

1. Defendant, Arsenal Building Corporation and Spear & Company, Inc., are corporations organized and existing by virtue of the laws of the State of New York having their principal places of business at 225 Fifth Avenue in the City, County and State of New York.

2. Defendant, Arsenal Building Corporation is the owner of a twenty-two (22) story and basement loft building located at 463 Seventh Avenue, City, County, and State of New York, at the corner of 35th Street and Seventh Avenue.

3. Defendant, Spear & Company, Inc., is the agent of defendant, Arsenal Building Corporation, in the management and operation of said building, and has and exercises control and supervision of the building service employees employed therein.

4. With minor exceptions, the tenants of defendant, Arsenal Building Corporation, and the employees of said tenants, are engaged in the production of ladies' garments for interstate commerce, or in the purchase and sale of ladies' garments for interstate commerce on their respective leasehold premises in said building.

5. There is no business relation between the defendant Arsenal Building Company and the defendant Spear & Company, Inc., on the one hand, and any of the tenants of Arsenal Building Corporation, on the other hand, except the relation of landlord and tenant.

6. The sole business of the defendant Arsenal Building Corporation, so far as said building is concerned, is that of a real estate operation in the leasing of space in said building, and rendering the ordinary type of service incident to the leasing of space in a loft building.

7. The sole activity of defendant Spear & Company, Inc., so far as said building is concerned, is the management and operation of said building as a loft building to be leased to tenants.

8. Defendant Arsenal Building Corporation employs twenty-six (26) employees, including a superintendent, who are engaged in various occupational classifications, and in the performance of the various duties hereinafter set forth.

9. The sole activities of the employees of defendant Arsenal Building Corporation are to supply the ordinary, usual type of service incident to the operation and maintenance of a loft building leased to tenants.

10. The duties of said employees respectively are to service and maintain said building as a whole, and not to render service to the tenants thereof, or to care for or maintain the leased premises, except to operate elevators to carry passengers and freight of said tenants, and occasionally to enter the leased premises in case of leaks or fire which threaten to damage the building outside of said leased premises, and to repair window cords or weights when windows do not work, and pry windows open which have been stuck due to painting of their sills.

11. The keys to the doors of the respective leased premises are solely in the custody of the tenants, and none of the building service employees has access to said keys, or leased premises.

12. None of the employees of Arsenal Building Corporation produces, manufactures, mines, handles, processes, or in any other manner touches, for the purpose of production, or works upon the goods produced by any of the tenants of Arsenal Building Corporation, and none of said employees transports any of said goods, except that some of said employees, as an incident to the general operation of said building, operate elevators which carry said goods of said tenants.

13. The superintendent of said building supervises, directs, and controls the twenty-five (25) building service employees of said building, and performs certain mechanical and maintenance work upon the said building and the machinery and appurtenances thereof.

14. The building mechanic, or handyman, of said building performs odd jobs around the building other than in the leased premises, and assists the superintendent.

15. The freight elevator starter of said building directs and controls the movement of four freight elevators in said building, directs and controls the five freight elevator operators in the performance of their duties, and from time to time,

relieves one or more of said freight elevator operators in the operation of said freight elevators.

16. One starter and one assistant starter direct and control the movement of five passenger elevators in said building, direct and control the activities of six passenger elevator operators, and, on occasion, the assistant starter relieves one or more of said passenger elevator operators in the operation of said passenger elevators.

17. Five freight elevator operators operate the four freight elevators in said building.

18. Six passenger elevator operators operate the five passenger elevators in said building.

19. Six porters clean, polish, and otherwise maintain public halls, public stairways, public lavatories, and elevators in said building, clean or otherwise maintain vacant space in said building and, on occasion, as relief men operate an elevator in said building.

20. Two watchmen patrol and otherwise care for the public spaces of said building, perform certain cleaning work and, on occasion, operate an elevator in said building.

21. Two firemen operate and otherwise care for boilers, pumps, and other building equipment of a similar nature in said building.

22. Said building purchases electric current and, through facilities furnished and maintained by a sub-metering company, sells such current to various tenants in said building.

23. Said building furnishes water to the public lavatories, to an automatic sprinkler system appurtenant to said building and to the tenants thereof for their use in their several businesses.

24. Said building supplies radiator heat for the leased premises.

25. In general, the duties of the building service employees of said building are limited to heating said building, keeping it in repair, protecting it from damage, cleaning the public halls, stairways, and spaces occupied by the common utilities of the building, keeping the public lavatories clean, and operating freight and passenger elevators for the tenants, for the employees of the carriers who fetch goods from or deliver goods to tenants, for the employees of tenants and the property—which is always in the custody of employees of carriers—brought to and shipped out by the tenants, and, in general, said employees, in fact, confine their activities to the performance of said duties.

26. In general, said building, and its employees, make no changes, alterations, repairs, or renovations in the leased

premises, except where said building agrees at the time of signing or renewing a lease to make certain specified changes or renovations of a definite limited character, in order to make said leased premises conform to the requirements of said lease, and, in general, all substantial alterations, renovations, or changes of such character are not performed by the employees of said building, but by outside contractors hired for such purpose by said building.

27. It is not a part of the duties of any of the employees of the defendant Arsenal Building Corporation to perform any work of any kind within the leased premises of the tenants except where it may be necessary to enter said premises for the performance of work which relates to the general condition, safety, and preservation of the building and, in general, the employees of Arsenal Building Corporation limit their activities accordingly, except that occasionally some of them do favors, usually on their own time, for the tenants and, generally, are given tips therefor by the tenant so favored.

28. The defendant Arsenal Building Corporation compensates its employees as aforesaid at rates of pay in excess of those set forth in Section 6 of the Fair Labor Standards Act of 1938.

29. Each of the aforesaid employees of defendant Arsenal Building Corporation is employed each week for a number of hours in excess of those set forth in Section 7 of the Fair Labor Standards Act. Defendant Arsenal Building Corporation fails and has failed to compensate each of such employees at the rate of time and one-half such employees, regular rate of pay for certain hours worked in excess of those set forth in Section 7 of the Fair Labor Standards Act of 1938, and threatens to continue to do so.

Conclusions of law

1. None of the employees of the defendant Arsenal Building Corporation is engaged in interstate commerce or the production of goods for interstate commerce, or in working in a manufacturing establishment producing goods for interstate commerce.

2. None of the employees of the defendant Spear & Company, Inc., is engaged in interstate commerce or in the production of goods for interstate commerce, or in working in a manufacturing establishment producing goods for interstate commerce.

3. Neither of the defendants is engaged in interstate commerce or in the production of goods for interstate commerce.

4. The defendants Arsenal Building Corporation and Spear & Company, Inc. are service establishments, whose servicing of the Arsenal Building is wholly in intrastate commerce within the meaning of Section 13(a)(2) of the Fair Labor Standards Act of 1938, and they are, therefore, exempted from the operation of said Act.

5. The plaintiff, in consequence of the foregoing findings of fact and conclusions of law has failed to prove a cause of action for an injunction against the defendants or either of them for the reason that the Fair Labor Standards Act of 1938 does not apply to them or either of them.

6. The defendants are, therefore, entitled to a judgment dismissing this cause as against both and each of them, but, as the plaintiff is an agency of the United States, costs will not be allowed on such dismissal to the defendants or either of them.

7. Submit judgment in accordance herewith to me for signature on the usual notice.

April 11, 1941.

WOOLSEY,
United States District Judge.

[CAPTION]

Opinion

On final hearing of a cause seeking to enjoin the defendants from violating the provisions of Section 15(a)(2) of the Fair Labor Standards Act of 1938, passed June 25, 1938, Title 29 United States Code, Sections 201-219.

Gerard D. Reilly, Esq., Solicitor of the Department of Labor, and Irving J. Levy, Esq., Assistant Solicitor thereof, attorneys for the plaintiff—by Arthur E. Reyman, Esq., Acting Regional Attorney, Irving Rozen, Esq., Senior Attorney, and Miss Helen E. Cottrell, of counsel.

Messrs. McLanahan, Merritt & Ingraham, attorneys for defendants—by Walter Gordon Merritt, Esq., Henry Clifton, Jr., Esq., and Martin J. Coughlin, Esq., of counsel.

WOOLSEY, J: My decision in this cause is that the complaint should be dismissed, but, as the plaintiff is an agency of the United States, costs should not be allowed to the defendants.

I. My subject matter jurisdiction in this cause arises out of the fact that it is a suit in a civil nature brought by an officer of the United States authorized by law to sue, Title 28 United States Code, Section 41(1), and also because it

is brought under the specific provisions of the Fair Labor Standards Act of 1938, Section 17, by which I am given special jurisdiction to restrain violations of Section 15 of said Act.

There is not any question of venue involved because suit is brought in the District wherein the defendants have their principal offices, and wherein only, suit for an injunction can be brought against them, and personal jurisdiction over them for the purposes of an injunction secured.

Furthermore, there is not any question whatever but that the defendants have been properly served by process, and have appeared and that I have personal jurisdiction over them. I mention this for the following reason:

On a pre-trial hearing before Judge Knox, held February 23, 1941, the defendants admitted jurisdiction of the subject matter in this Court and of their persons, and Judge Knox overruled their defense in so far as it challenged such jurisdiction. But no order was entered on his ruling. Consequently there is not any formalized rule of the case here.

The defendants, at the pre-trial hearing, withdrew their claim that the Act was unconstitutional generally speaking, and claimed merely that the Fair Labor Standards Act of 1938 was not applicable to the defendants and their employees.

II. As is always the case, there are some preliminaries of which disposal must be made before we get down to the real gist of the case. These are as follows:

1. During the argument I indicated that the Third, or so-called Partial Defense, could not be invoked in an action for an injunction, but could only be invoked, if at all, in a claim for monetary damages.

Consequently, that defense was overruled as a matter of law, and is no longer in the cause.

2. On motion of the plaintiff Paragraph 9 of the complaint, reading as follows:

"The goods produced and sold by said tenants, as aforesaid, compete with similar goods produced and sold in other states and said tenants in their said business compete with manufacturers of ladies' garments and with persons selling silks, rayon, supplies, and printed material at wholesale, as aforesaid, located in other states," was stricken out. Therefore it is no longer contained in the record.

3. During the argument, in order to be certain that the defendants would not have to rely solely on their general denials of the applicability of the Act, and in order to prevent any lacuna in the pleadings, I suggested to counsel for the

defendants that they should plead as a special defense that the defendants were "service establishments" within the meaning of the exception contained in Section 13(a)(2) of the Fair Labor Standards Act.

Accordingly, the defendants moved to amend their answer by adding a fourth defense as follows:

"That the defendant, Arsenal Building Corporation, and the defendant, Spear & Company, Inc., as its agent, are engaged in the operation of a service establishment within the meaning of Section 13(a)(2) of the Fair Labor Standards Act, and are, therefore, exempted from the application of the Act."

I granted this motion over what to me seemed an unaccountable objection by counsel for the plaintiff.

This amendment, which I regard as wholly within my discretion as trial Judge under the circumstances of this cause, in my opinion, made the pleadings conform to the proofs.

III. I now turn to the merits of this cause.

The facts, briefly summarized, are as follows:

1. The two defendants, Arsenal Building Corporation and Spear & Company, Inc., are corporations of New York State, having their principal places of business in the City, County, and State of New York, and within this District.

The Arsenal Building Corporation is the owner of a twenty-two story basement and loft building located at the corner of Thirty-fifth Street and Seventh Avenue, in the City of New York. The building is known as 463 Seventh Avenue.

The defendant, Spear & Company, Inc., is the agent of the defendant, Arsenal Building Corporation, in the management and operation of the building above referred to, and has and exercises control and supervision of the building service employees employed in the said building.

With the exception of a retail clothing store, a barber shop, and a cigar stand on the ground floor, the space in the loft building is leased, through Spear & Company, Inc., by the Arsenal Building Corporation, to approximately forty-two tenants, of whom forty are engaged in manufacturing various types of ladies' garments for sale not only in New York, but in other States, and of whom two tenants are engaged in the sale, at wholesale, within and without the State of New York, of silks, artificial silks—such as rayon—and print goods, to manufacturers, wholesalers, and contractors in the ladies' garment industries.

The sole business of the Arsenal Building Corporation is that of a real-estate owner whose activities are limited to the leasing of space in its building to tenants, the maintenance of

its building in good order and condition, and rendering to its tenants the ordinary type of service customary in the operation of a loft or office building.

2. The defendant Arsenal Building Corporation employs and pays wages to twenty-six (26) service and maintenance employees, including the superintendent of the building.

These employees are engaged, under various occupational classifications, in the performance of various duties about the building.

The duties of these maintenance and service employees are to supply the ordinary service above summarized, incident to the operation and maintenance of a loft or office building leased to tenants: namely, to service and maintain the building as a whole, but not to render service to individual tenants thereof, except as a landlord; to operate the elevators to carry passengers and the goods of the tenants; only to enter the premises of the tenants in the case of emergencies which threaten to damage the building outside the leased premises by leaks, fire, or otherwise, and to repair the window cords and window weights when windows do not work, or to open windows which have become stuck after the painting of window frames.

The keys to the doors of the respective leased premises are solely in the custody of the tenants and none of the service employees has access to the keys or to the leased premises except on the occasion of the emergencies to which reference has been above made.

None of the employees of the Arsenal Building Corporation produces, manufactures, handles, processes, or in any other manner works or touches for the purpose of production, or works in any manner upon the goods produced by any of the tenants of the Arsenal Building Corporation, and none of such employees transports said goods in any proper sense, although some of them, as incidental to their building service, operate elevators which carry goods which are always in the custody of the representatives of the tenants, or their employees, or of employees of persons whom the tenants have engaged to transport the goods, or of the employees of carriers from whom they are receiving goods.

It may, therefore, be stated generally, on the unchallenged evidence, that the duties of the building service and maintenance employees of the Arsenal Building Corporation are limited to heating the building, keeping it in repair, protecting it from damage wherever damage is threatened, cleaning the public halls, stairways, toilets, and other spaces occupied by

the various common utilities of the building, and operating freight and passenger elevators for the tenants, their employees and the persons who carry the goods of tenants to and from the building.

3. Generally speaking, the Arsenal Building Corporation and its employees, make no changes, alterations, repairs or renovations in the leased premises, except where the Corporation agrees at the time of signing or renewing the lease, to make certain specific changes or renovations of a definite limited character in order to make the leased premises conform to the requirements of the tenant, as stated in the lease, or otherwise agreed upon with the Corporation. All substantial alterations, renovations or changes of such character are usually made not by the maintenance and service employees of the Arsenal Building Corporation, but by outside independent contractors hired for such purpose by the Arsenal Building Corporation.

It is not a part of the duty of any maintenance or service employee of the Arsenal Building Corporation to perform any work of any kind within the leased premises of the tenants, except where it may be necessary to enter the premises for the performance of work which, as above noted, relates to the preservation of the building in good condition so that it will operate satisfactorily; and except that occasionally some of the service and maintenance employees of the Arsenal Building Corporation, as above stated, do favors, usually on their own time, for the tenants and generally are given tips therefor, their activities are limited as indicated.

IV. This cause is especially concerned with Section 7 of the Fair Labor Standards Act, because it involves a question of hours of service and payment for overtime and not a question of the rate of wages, which is dealt with in Section 6.

It is sufficient for the purpose of this cause at this point, therefore, to refer only to Section 7(a) of the Act, which reads as follows [italics mine]:

"No employer shall, * * * employ any of his employees *who is engaged in commerce or in the production of goods for commerce*—

"(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

"(2) for a workweek longer than forty-two hours during the second year from such date, or

"(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess

of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

There is not any complaint as to the rate of wages paid, which are in excess of those at present required by Section 6 of the Fair Labor Standards Act.

The complaint is that the defendant, Arsenal Building Corporation, through defendant Spear & Company, Inc., as its agent, has employed its building service employees each week for a number of hours in excess of those set forth in Section 7 of the Fair Labor Standards Act, and that the defendant Arsenal Building Corporation fails and has failed and threatens to continue to fail to compensate each of its building service employees for hours of work in excess of those set forth in Section 7 of the Fair Labor Standards Act, at the rate of pay prescribed for such overtime employment.

It is provided by Section 13(a) of the Act, however, that [italics mine]—

"The provisions of sections 6 and 7 shall not apply with respect to * * * (2) *any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce.*"

V. The question that is before me in this cause is, therefore, whether the Administrator of the Wage and Hour Division of the United States Department of Labor can, under the Fair Labor Standards Act of 1938, Title 29, United States Code, Sections 201–219, successfully maintain a cause of action for an injunction against the defendants who are not engaged in commerce and who have not any relation with production for commerce except that they lease space to tenants who are engaged in such production.

1. Now the word "commerce" is defined in Section 3(b) of said Act as follows:

"'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof."

The word "produced" is defined in Section 3(j) of the said Act as follows:

"'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process of occupation necessary to the production thereof, in any State."

The interesting words in Sections 6 and 7 of the Fair Labor Standards Act of 1938, so far as I am concerned, in this cause are the words "production of goods for commerce."

2. What has to be done, of course, in a case of this kind which involves the ambit of a statute which has been held constitutional by the Supreme Court of the United States—cf. United States of America v. F. W. Darby Lumber Company and Fred Darb decided February 3, 1941, and the Opp Cotton Mills, Inc., et al., petitioners, against Administrator of the Wage and Hour Division of the United States Department of Labor, decided on the same day—is to determine what concept was in the mind of the Congress when it adopted the statute.

Here we must determine what the words "production of goods for commerce," used in the Fair Labor Standards Act, connote.

3. The Fair Labor Standards Act does not, however, as does the National Labor Relations Act, extend the limit of the federal jurisdiction to any act "affecting commerce." Cf. Title 29, United States Code, Sections 152(7) and 159(c), and also Labor Board v. Jones & Laughlin, 301 U. S. 1, at pages 29–32.

The limits of the federal jurisdiction under the Fair Labor Standards Act is extended only to employees "engaged in commerce or in the production of goods for commerce." Title 29, United States Code, Sections 203, 206, and 207. Thus the connection of the employees who come under the Fair Labor Standards Act must be direct with commerce, as defined in that Act. This involves an obviously narrower concept than the words "affecting commerce" used in the National Labor Relations Act which was cited as an analogy by the Government counsel during the argument of this cause.

Furthermore, the legislative history of the Fair Labor Standards Act shows clearly, I think, that as a result of the Conference between the Committees of the two Houses of Congress, the words "production of goods for commerce" were substituted for the words "affecting commerce" which had been contained in the successive drafts of the statute during its embryonic stages. Cf. 75th Congress, 1st Session, Report No. 884, of July 6, 1937, by Senator Black, of the Senate Committee on Education and Labor; 75th Congress, 1st Session, Report No. 1452, of August 6, 1937, by Mrs. Norton, of the House Committee on Labor; 75th Congress, 3rd Session, Report No. 2182 (at page 2), of April 21, 1938, by Mrs. Norton, of the House Committee on Labor; 75th

Congress, 3rd Session, Report No. 2738, of June 11, 1938, being the Conference Report made by Mrs. Norton, of the House Committee on Labor; see also "The Coverage of the Fair Labor Standards Act and Other Problems in its Interpretation," to be in "Law and Contemporary Problems—The Wage and Hour Law"—published by the School of Law of Duke University, in the summer of 1939, Volume 6, No. 3, pages 334–352, especially pages 338–339.

This indicates quite graphically that when the Fair Labor Standards Act of 1938 was passed the intent of Congress was that its ambit should be narrower than the ambit of the National Labor Relations Act, and, consequently, it seems perfectly clear to me that the employees of the defendants are not to be considered as included within the Fair Labor Standards Act of 1938. The acts of these employees might "affect commerce," but I find that they did not function in the "production of goods for commerce" even under the broad definition of "produce" given by the statute as quoted above.

I find, therefore, that the employees of the defendants were not working in manufacturing establishments producing goods for commerce.

4. It seems to me, however, although I am aware that a different view has been taken by Judge Kirkpatrick of the District Court, Eastern District of Pennsylvania, in the case of Fleming v. A. B. Kirschbaum Company, decided during the trial of this cause, that the real question in this cause is whether or not the facts show that the defendants are "service establishments" within the exception contained in Section 13(a)(2) of the Fair Labor Standards Act of 1938.

This cause was tried with the utmost thoroughness. Five days were occupied in the trial. It seemed to me, as the trial progressed, that the Government had, in its attempt to tie up the employees of the defendants with "production of goods for commerce," proved beyond any peradventure that the defendants, Arsenal Building Corporation and Spear & Company, Inc., as its agent, were "service establishments," all of whose servicing was in intrastate commerce, and I so find.

5. Furthermore, the leases between the defendant Arsenal Building Corporation and its several tenants, which defined their legal relations to each other and which was their only connection with each other, in my opinion, constituted a definite and effective insulation of the employees of the Arsenal Building Corporation from being involved in the "production of goods for commerce," despite the fact that

its tenants were so engaged. This is true, in my opinion, notwithstanding the broad definition contended for by the plaintiff as having been given under the Fair Labor Standards Act of 1938 to the word "produce."

6. So far as the elevators were concerned, which perhaps was the most arguable point of the plaintiff's case, I think that, if considered as engaged in any commerce, they were engaged in a vertical intrastate commerce and could not have been considered to have been engaged in interstate commerce in any proper sense.

It is difficult, if not impossible, to imagine a more localized employment than the maintenance and operation of a loft or office building.

VI. I am filing herewith my formal findings of fact and conclusions of law.

An order dismissing the complaint without costs may be served on the plaintiff's attorneys with the usual notice.

April 11, 1941.

(Signed) JOHN M. WOOLSEY.
United States District Judge.

At a stated term of the United States District Court for the Southern District of New York, held in and for the Southern District of New York at the United States Court House, Foley Square, Borough of Manhattan, City and State of New York, on the 19th day of April 1941.

Present: Hon. JOHN M. WOOLSEY, District Judge.

[CAPTION]

Judgment

This cause having come on to be tried before the Court, and the evidence adduced by the parties having been heard, and the cause having been argued by counsel, and the Court having made and filed its findings of fact and conclusions of law, it is hereby

Ordered, adjudged, and decreed that this cause be, and it hereby is, dismissed on the merits; it is further

Ordered, adjudged, and decreed that the defendants shall recover no costs in this cause.

Approved:

WOOLSEY,
United States District Judge.

Judgment rendered April 21st, 1941.

GEORGE J. H. FOLLMER, *Clerk.*

Notice of appeal to Circuit Court of Appeals

Notice is hereby given this 5th day of May 1941, that the plaintiff, Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from that part of the judgment of this court entered on the 21st day of April 1941, as is in favor of the defendants against said plaintiff.

GERARD D. REILLY,
Solicitor,
IRVING J. LEVY,
Assistant Solicitor in Charge of Litigation,
ARTHUR E. REYMAN,
Regional Attorney,
IRVING ROZEN,
Senior Attorney,
United States Department of Labor,
Attorneys for Plaintiff.

Designation of portions of record to be contained in the record on appeal stipulation

To the CLERK OF THE ABOVE NAMED COURT:

The parties hereto, by their respective attorneys, stipulate and agree that the record on the appeal of the plaintiff from the judgment of this Court rendered the 21st day of April 1941, shall be constituted of the portions of the record, proceedings, and evidence in the case as set out hereinbelow, said portions of the record, proceedings and evidence being designated as the record on appeal.

In accordance with Rule 75 (a) of the Federal Rules of Civil Procedure, you are hereby requested to make a transcript of portions of the record to be filed in the United States Circuit Court of Appeals for the Second Circuit, pursuant to the notice of appeal filed in the above entitled cause, in accordance with the following designation:

1. Statement under Rule 13.
2. Summons and amended complaint.
3. Amended answer.
4. Minutes of pre-trial conference held before Hon. John C. Knox, United States District Judge, on February 28, 1941.
5. Minutes of the trial, before Hon. John M. Woolsey, United States District Judge, on March 24 and March 31 and April 1 to April 4, 1941, inclusive.

6. Stipulation herein between plaintiff and defendants, dated June 10, 1941, stipulating that Exhibits "1," "2," "3," "4," "5," "18," "23," "24," "26," "27," "28" (except one rent bill for March 1941); "29" (except one electric service bill for period commencing August 20, 1940), "30" and "53" be omitted from the transcript of record on appeal.

7. Plaintiff's Exhibits "6," "7," "8," "9," "10," "11," "12," "13," "14," "19," "20" (including writings and attachment), "21," "22," "25," "31," "47," "48," "49," "50," "51," "52."

8. That part of plaintiff's Exhibit "28" consisting of a rent bill for March 1941.

9. That part of plaintiff's Exhibit "29" consisting of an electric service bill for period commencing August 20, 1940.

10. Defendants' Exhibit "A."

11. Findings of Fact and Conclusions of Law, Hon. John M. Woolsey, United States District Judge, filed April 11, 1941.

12. Opinion, Hon. John M. Woolsey, United States District Judge, filed April 11, 1941.

13. Judgment, rendered April 21, 1941.

14. Notice of appeal, filed May 5, 1941.

15. Designation of portions of record to be contained in the record on appeal—stipulation.

Said transcript is to be prepared as required by law and the rules of this court, and the Federal Rules of Civil Procedure, and is to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Second Circuit, at New York, New York, on or before the day of 1941.

GERARD D. REILLY,
Solicitor,

IRVING J. LEVY,
Assistant Solicitor in Charge of Litigation,

ARTHUR E. REYMAN,
Regional Attorney,

IRVING ROZEN,
Senior Attorney,
United States Department of Labor,
Attorneys for Plaintiff.

MCLANAHAN, MERRITT & INGRAHAM,
Attorneys for Defendants.

[CAPTION]

Stipulation

Whereas, it is deemed desirable by the parties hereto, in order to effect a saving in the costs of printing the record on appeal herein, to prepare and substitute new diagrams in the place and stead of Defendants' Exhibit "a," and the diagram of floor space which is part of Plaintiff's Exhibit "22."

Now, therefore, it is hereby stipulated and agreed by and between the attorneys for respective parties hereto that, subject to the approval of the Court herein, a new Defendants' Exhibit "a" may be prepared and substituted in the record in the place and stead of Defendants' Exhibit "a," heretofore marked in evidence at the trial in the above entitled action, held in the Court below, on April 1, 1941, with the same force and effect as if it had been received and marked in evidence at said trial, and a new diagram may be prepared and substituted in the record in the place and stead of the diagram of floor space now part of Plaintiff's Exhibit "22," with the same force and effect as if it had been received and marked in evidence at said trial.

GERARD D. REILLY,
Solicitor,

IRVING J. LEVY,
Assistant Solicitor in Charge of Litigation,
ARTHUR E. REYMAN,
Regional Attorney,
IRVING ROZEN,
Senior Attorney,
United States Department of Labor,
Attorneys for Plaintiff.

MCLANAHAN, MERRITT & INGRAHAM,
Attorneys for Defendants.

Dated, New York, New York, July 24, 1941.
So Ordered:

LEARNED HAND, *U. S. C. J.*

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, ss.

PHILIP B. FLEMING, Administrator of the Wage and Hour Division, United States Department of Labor, Plaintiff-Appellant

v.

ARSENAL BUILDING CORPORATION AND SPEAR & COMPANY, INC., Defendants-Appellees

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I, GEORGE J. H. FOLLMER, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District in the above-entitled matter as agreed on by the parties.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this .. day of September in the year of our Lord one thousand nine hundred and forty-one and of the Independence of the said United States the one hundred and sixty-sixth.

Clerk.

U. S. GOVERNMENT PRINTING OFFICE: 1941

[fol. 343] United States Circuit Court of Appeals for the Second Circuit, October Term, 1941

No. 87

(Argued November 5, 1941. Decided December 30, 1941)

Philip B. Fleming, Appellant,

v.

Arsenal Building Corporation et al., Appellees

Appeal from a judgment of the District Court for the Southern District of New York, dismissing a complaint in an action to compel compliance with §7(a) of the "Fair Labor Standards Act of 1938."

Before L. Hand, Clark and Frank, Circuit Judges

Irving J. Levy for the appellant.
Walter Gordon Merritt for the appellees.

[fol. 344] L. Hand, C. J.:

The plaintiff appeals from a judgment, dismissing after trial his complaint against the defendants—filed under §17 of the "Fair Labor Standards Act of 1938"—to restrain violation of §15(a) (2) of that act. The only question is whether §7(a) requires the defendants to pay "time and a half" to their employees. (We may ignore the defendant, Spear & Co., Inc., for any decision as to it must concededly follow that as to the Arsenal Building Corporation, of which we shall speak as the defendant.) The facts are as follows. The defendant owns a twenty-two story loft building in New York City, of which it lets out substantially all the space to manufacturers of women's clothes, who are concededly engaged in interstate commerce: i.e., they import part of their raw materials into the state and send out of the state a large part of the completed clothes. (With the exception of three of these manufacturers, the sales of two of whom were very small, the percentage of interstate shipments was in every case more than two-thirds; the percentage of the total shipments was 82.) All but two occupy less than a single story of the building; one occupies one and a half stories, and the other, five and a half. The defendant

has no other business but leasing the space, collecting the rent and such services as are incidentally necessary: e.g., protecting the tenants' property, keeping the building itself clean, warm, lighted and in repair, furnishing steam and hot water, and manning and running the elevators. To render these services it employs 25 workmen of various sorts (besides a superintendent, concededly not within the act) and it has refused to pay them "time and a half" for overtime as defined by §7(a) (1) and §7(a) (2) of the act. The plaintiff's position is that, although these employees do not have any part in the actual handling of materials or of the [fol. 345] finished goods (except insofar as running the elevators may be such) they are nevertheless "engaged in commerce" and "in the production of goods for commerce" within §7(a). The defendant denies this, and further asserts that it is in any case exempted by §13(a) (2) because the employees are engaged in a "service establishment the greater part of whose * * * servicing is in intrastate commerce." Finally it says that the act does not cover the employees of employers who are not themselves "engaged in commerce or in the production of goods for commerce." The district judge held that the employees were not "engaged in the production of goods for commerce," or "in commerce," and that the defendant was a "service establishment" all of whose activity was intrastate.

We think that the employees here in question are "engaged * * * in the production of goods for commerce" within §7(a), and for that reason we do not find it necessary to decide whether they are also "engaged in commerce." First, are they engaged in the production of goods at all? Section 3(j) defines that phrase as meaning, "employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof." Whatever may be thought of the applicability of this definition down to the last clause, we are satisfied that the "occupation" of these men was "necessary to the production" of the clothes. If instead of leasing space in the defendant's building, the manufacturers had each owned and occupied a whole factory of his own, this conclusion seems to us scarcely debatable. Cutters and stitchers cannot work in a cold or filthy building; they must have light and power to drive their machines; they cannot be required to carry goods from one story to another.

Those who make and keep the factory fit for them in these ways are as "necessary" to "production" as they are [fol. 346] themselves.# Yet it would as much defeat the purpose of the act, as expressed in §2, to deprive such workmen of its protection when they chance to be employed by a different employer, as when they are employed by the employer of the cutters and stitchers. And a competing dressmaker may find his rival's lower rent as "unfair" a differential against him in the cost of production, as lower wages; he will indeed feel it less directly, but it may still be felt. We may therefore start with the assumption that Congress did not mean to draw any line, based merely upon the division of the same duties among several employers, unless the language of the act very plainly requires us to believe that it did. We can find none that compels us so to believe; on the contrary §3(i) which includes "parts and ingredients" of "goods" with the goods themselves, confirms our understanding. The history of the clause affords further confirmation; it originally read: "or in the making of tools or dies used in the production of such goods in any State." That obviously implied that the later use of the tools and dies—otherwise outside the act—might characterize them enough from the outset to put within it those who made them. The final form of words chosen was far more general, it is true, but there is no indication of any change in the original intent in this regard.

To this the defendant answers that it proves too much, for Congress could not have meant to impose "fair labor standards" upon everyone who might chance to contribute any necessary "ingredient," or service to the production of [fol. 347] goods "produced for commerce." The miller who furnishes the flour to a baker who sells bread in other states could not have been intended; or the cutler who sells knives to a wholesale butcher; or the service station which repairs

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Bowie v. *Gonzalez*, 117 Fed. (2d) 11, 20 (C. C. A. 1); *S. H. Robinson & Co.* v. *LaRue*, Sup. Ct. Tenn. Nov. 29, 1941; *Wood* v. *Central S. & G. Co.*, 33 Fed. Suppl. 40; *Lefevers* v. *General Export I. & M. Co.*, 36 Fed. Suppl. 838; *Muldowney* v. *Seaberg Elevator Co.*, 39 Fed. Suppl. 275; *Fleming* v. *Pearson Hardwood Flooring Co.*, 39 Fed. Suppl. 300. *Rogers* v. *Glazer*, 32 Fed. Suppl. 990; and *Goldberg* v. *Worman*, 37 Fed. Suppl. 778 concerned "retail establishments" and are not to the contrary.

and fills a manufacturer's trucks; or the chemist who supplies alcohol to a perfumer. Stated so generally, the argument may be sound; at any rate we will assume arguendo that the purveyor of "ingredients" or services to all-comers at random will not find himself within the act merely because some part of what he sells eventually finds its way into "goods produced for commerce." Perhaps in the end it will turn upon the distribution of his customers among those who are engaged in interstate commerce and those who are not; here, as so often, the test may be one of degree. We need not answer, for here at any rate no such dilemma presents itself. As we have said, the work of the defendant's employees is in kind substantially the same as it would be if the manufacturers employed them directly. That is the substance of the matter. Since the words and the purpose of the act coalesce so far, we will not allow ourselves to be drawn into dialectical niceties which are not before us and whose answer need not compromise the step we are taking.

Nor do we think that the defendant is a "service establishment the larger part of whose * * * servicing is in intrastate commerce"; § 13(a)(2). Possibly it is not a "service establishment" at all; perhaps that phrase should be limited to those who serve consumers directly, like tailors, or garages, or laundries; the juxtaposition of retail selling and "servicing" does indeed suggest as much. But it is enough for our purpose that, if it is a "service establishment," at least its exemption must depend upon the extent to which its servicing is intrastate. Suppose for example, that these manufacturers, instead of pressing the clothes themselves, sent them out to other shops which pressed only for them; the fact that the pressing took place in the [fol. 348] same state as the cutting and stitching would not, we think, exempt the pressers; their servicing would be "in interstate commerce." The "servicing" being a part of "production," the test should be what kind of production it is a part of. The question is really the same as that we have just considered: i. e., whether it is important how that production is divided among employers. It cannot be that if the exemption extends beyond retail "servicing," it is the character of the "servicing" itself that counts, divorced from the "production" of which it is a part. Again, we should be met by the anomaly arising from such an interpretation—the capricious incidence of the

act resulting from the accident of the industrial division of the whole process.

The defendant's last argument is based upon §§ 5 and 8, which prove, it says, that the act covers only the employees of employers who are themselves "engaged in" interstate commerce. Acknowledging, as it must, that § 6 commands "every employer" without limitation to "pay to each of his employees" the standard wage, and that § 7 declares that "no employer" shall "employ any of his employees" for more than the prescribed hours, the defendant rests its argument upon the constitution and functions of the "industry committees." Since these must be composed only of employers "engaged in" interstate commerce, and since they have power to fix the rate of wages, the argument is that the act cannot apply to employers who are not represented upon them. We do not agree. Section 5(a) does not confine the "Administrator" to committees for "each industry engaged in commerce"; he may also appoint them for industries "engaged * * * in the production of goods for commerce." One third of its membership must, it is true, "represent employers in the industry"; and § 8 gives power to the committees to fix the wage in the "industry" (not over 40 cents an hour) and to report to the "Administrator," who is to approve the report "if he finds that the recommendations are made in accordance [fol. 349] with law, are supported by the evidence * * * and * * * will carry out the purposes of this section"; otherwise he is to refer back the question to the same or another committee. (Subd. d.) Section 3(h) defines an "industry" as including not only a "branch" of an industry, but "a group of industries."

It is certainly undesirable, and it is probably impossible, to define with accuracy just what are the limits imposed upon the "Administrator's" choice by § 5, but if we read subdivisions a and b together and interpolate in their proper places the definitions of § 3(h) and § 3(j), we get substantially the following. The "Administrator" is directed to appoint a number of persons "representing employers" for each "group of industries" whose employees are "employed * * * in any process or occupation necessary to the production" of "goods for commerce." Certainly this grants him the power if he thinks best to put upon one committee an employer "engaged * * * in the production of goods for commerce," like the defendant, with em-

ployers "engaged in interstate commerce," like the tenants. *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 149, 150. The history of §§ 6 and 7 in Congress leaves no doubt that this is the right view. In the Senate the sections read in substance as they now do, though the wording was somewhat different (Senate Bill 2475 passed July 31, 1937). The House amended them to limit them to employers engaged in commerce or in industry affecting commerce (taking the view now urged by the defendant) and to include all the employees of such employers. The conference report particularly dealt with this difference (House Report 2738, 75th Congress 3rd Session pp. 29 and 30) and declared that the only test should be the occupation of the employees; Senator Pepper, one of the managers in the Senate, expressly stated on the floor that this was its meaning.

As has already appeared from the decisions cited, the question now at bar has come up a number of times when [fol. 350] the ancillary service was performed by employees of the same employer who was himself "engaged in commerce"; and the result has been fairly uniform. We have found five decisions of appellate courts, which have dealt with employees of an employer, who was not "engaged in commerce," or whom at least the courts treated as not so "engaged." So far the score is four to one against the view we take. In *Killingbeck* v. *Garment Center Capitol Inc.*, 259 App. Div. 691; *Robinson* v. *Massachusetts Mutual Life Insurance Co.* (Sup. Ct. Tenn. Nov. 29, 1941); *Cecil* v. *Gradison* (Ohio Ct. App. 1st Dist. Nov. 17, 1941); and *Pederson* v. *Fitzgerald Construction Co.* (N. Y. App. Div. 3rd Dept. Nov. 12, 1941) it was held the act did not apply to employees who were assisting in the work of another employer, himself "engaged in commerce." It is true that in some of these it would have been something of a strain upon the word, "production," to say that the employees were "engaged in the production of goods" at all; but it is doubtful that the courts meant to rely upon any such distinction, and it is for this reason that we count them against our view. On the other hand the Third Circuit in *Fleming* v. *Kirschbaum Co.*, 123 Fed. (2d) —, agrees with us and indeed in one or two matters went farther than we have found it necessary as yet to go. In the district courts *Farr* v. *Smith Detective A. & N. W., Service Inc.*, 38 Fed. Suppl. 105, went off upon the fact that the ancillary

services to the employer engaged in interstate commerce were occasional; but *Allen* v. *Moe*, 39 Fed. Suppl. 5, must be counted with *Fleming* v. *Kirschbaum Co.*, though it is not on all fours.* Obviously the question will not be set at rest until the Supreme Court makes an authoritative ruling.

Judgment reversed.

[fol. 351] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of January one thousand nine hundred and forty-two.

Present: Hon. Learned Hand, Hon. Charles E. Clark, Hon. Jerome N. Frank, Circuit Judges.

PHILIP B. FLEMING, Administrator, etc., Plaintiff-Appellant,

v.

ARSENAL BUILDING CORPORATION, et al., Defendants-Appellees

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 352] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Philip B. Fleming v. Arsenal Building Corp. et al. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 15, 1942. D. E. Roberts, Clerk.

[fol. 353] Clerk's Certificate to foregoing transcript omitted in printing.

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* *Merryfield* v. *Hoyt Shoe Corp.*, U. S. D. C. N. H., is to the contrary.

[fol. 354] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 2, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

OCTOBER TERM, 1941

No. 924

ARSENAL BUILDING CORPORATION
AND SPEAR & CO. INC.,

Petitioners,

AGAINST

PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1941

ARSENAL BUILDING CORPORATION and SPEAR & CO., INC., Petitioners, *against* PHILIP B. FLEMING, Administrator of the Wage and Hour Division, United States Department of Labor, Respondent.	No.

Come now ARSENAL BUILDING CORPORATION and SPEAR & CO., INC., your petitioners, by WALTER GORDON MERRITT, and KENNETH C. NEWMAN, their counsel, and move this Honorable Court that it shall by certiorari or other proper process directed to the Honorable the United States Circuit Court of Appeals for the Second Circuit, require said Court to certify and remove unto this Court for its review and determination, a certain cause lately pending in said Court, wherein your petitioners were defendants-appellees and Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, was plaintiff-appellant, and to that end your petitioners aforesaid now tender herewith their petition with a certified copy of the record in said cause.

WALTER GORDON MERRITT,
KENNETH C. NEWMAN,
Counsel for Petitioners.

Supreme Court of the United States

OCTOBER TERM, 1941

ARSENAL BUILDING CORPORATION and SPEAR & CO., INC.,
Petitioners,

against

PHILIP B. FLEMING, Administrator of the Wage and Hour Division, United States Department of Labor,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO BE ADDRESSED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Your petitioners, ARSENAL BUILDING CORPORATION and SPEAR & CO., INC., respectfully show to this Court as follows:

Parties and History of the Proceedings

1. Your petitioners are domestic corporations, organized and existing under the laws of the State of New York and maintain places of business in the City, County and State of New York. Your petitioner, Arsenal Building Corporation, is the owner of a 22 story loft building located in the City of New York and engages in no other business than the ownership and management of said building. Your petitioner, Spear & Co., Inc., is engaged solely in the management and operation of real property in the City of New York and acts as agent in managing the building owned by your petitioner, Arsenal Building Corporation.

2. The respondent is Administrator of the Wage and Hour Division, United States Department of Labor and under the provisions of the Fair Labor Standards Act of 1938, (Act of June 25, 1938, c. 676, 52 Stat. 1060, U. S. C., Title 29, Sec. 201 *et seq.*) is charged with the administration and enforcement of said Act.

3. This suit was commenced by the respondent in the United States District Court for the Southern District of New York, on March 21, 1940, by the filing of a complaint. Thereafter and on or about March 31, 1941, an amended complaint was filed. A permanent injunction was sought enjoining and restraining your petitioners from violating Section 15 (a) (2) of said Act by continuing to employ in the Arsenal Building certain building service employees (whose duties, and the circumstances of whose employment, are more precisely set forth in the findings (paragraph 8 below, page 6)) for work weeks in excess of those prescribed in Section 7 of the Act without the payment of the specified overtime compensation.

4. A trial of this case was had before the Hon. John M. Woolsey, District Judge of the United States District Court, for the Southern District of New York, who on April 21, 1941, rendered a judgment (R. 338), embodying findings of fact and conclusions of law, dismissing the amended complaint.

5. An appeal was thereupon taken by the respondent from the decision aforesaid and the judgment entered thereon to the United States Circuit Court of Appeals for the Second Circuit (R. 339), which, on December 30, 1941, reversed the judgment of the District Court. Said reversal was based solely upon matters of law and all of the findings of fact of the District Court were permitted to stand.

The reversal was based upon the following reasons:

(a) That the employees of the Arsenal Building, were engaged in the production of goods for interstate commerce or in processes or occupations necessary to such production, within the meaning of the Act.

(b) That it was immaterial, as a matter of law, that neither of your petitioners was itself engaged in interstate commerce or in the production of goods for interstate commerce.

(c) That neither of your petitioners constitute a "service establishment the greater part of whose . . . servicing is in intrastate commerce" within the meaning of the exemption contained in Section 13 (a) (2) of the Act.

6. On January 14, 1942, the said United States Circuit Court of Appeals for the Second Circuit, entered its order staying and withholding the mandate in this case pending this application by your petitioners for a writ of certiorari to said Court.

Jurisdiction

7. Jurisdiction to review this case upon writ of certiorari before judgment is expressly conferred upon this Court by Judicial Code, Sec. 240, as amended (Act of March 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Act of March 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; U. S. C., Title 28, Sec. 347), to which Rule 39 of the Rules of this Court is applicable.

The Facts as Established by the Findings

8. No questions as to conflicting evidence or as to the weight of the evidence are involved and the facts of the case as found by the District Court (R. 326-30), and adopted by the United States Circuit Court of Appeals for the Second Circuit, are briefly as follows:

The petitioners are both New York corporations. The Arsenal Building Corporation owns a twenty-two story loft building in New York City, which, in turn, is managed by Spear & Co., Inc., as Agent.

With minor exceptions, the tenants, and their employees, in said building produce ladies' garments for interstate commerce, and purchase and sell ladies' garments in interstate commerce but there is no business relation between the tenants and either of petitioners other than that of landlord and tenant.

The sole business of the Arsenal Building Corporation is that of a real estate operation in leasing space in said building and rendering service incident thereto.

The sole activity of Spear & Co. Inc., in said building is its management and operation thereof as a loft building to be leased.

In this connection, Arsenal Building Corporation, through Spear & Co. Inc., employs about twenty-six employees to supply the ordinary type of service incident to the operation and maintenance of such a building. These employees service and maintain the building as a whole, but do not render service to the tenants, or care for the leased premises, except to operate passenger and freight elevators, and, occasionally, to enter these premises in case of leaks or fire, and to repair windows, when damage to the building as a whole is threatened. The keys of the leased premises are in the custody of the tenants and none of the employees of the Arsenal Building have access to them, or to the leased premises.

"None of the employees of Arsenal Building Corporation produces, manufactures, mines, handles, processes, or in any other manner touches, for the purpose of production, or works upon the goods produced by any of the tenants of Arsenal Building Corporation, and none of said employees transports any of said goods, except that some of said employees, as an incident to the general operation of said building, operate elevators which carry said goods of said tenants" (R. 327).

The duties of the twenty-six employees are briefly outlined.

The superintendent directs the building service employees and performs certain mechanical and maintenance work.

The building mechanic or handyman performs odd jobs around the building other than in the leased premises and assists the superintendent.

The freight elevator starter directs the five freight elevator operators in respect to their operation of four freight elevators. From time to time he relieves one of said freight elevator operators in the operation of an elevator.

One elevator starter and one assistant starter direct six operators, in the operation of the five passenger elevators and on occasion the assistant starter relieves one of the said elevator operators.

Six porters clean, polish and otherwise maintain public halls, stairways, lavatories, etc., and on occasion, as relief men, operate an elevator.

Two watchmen patrol the public places, perform some cleaning work, and on occasion operate an elevator.

Two firemen care for boilers, pumps and like equipment.

Arsenal Building Corporation buys electric current from the Consolidated Edison Company, and resells it to tenants through facilities furnished by a sub-metering company.

The building furnishes water for the public lavatories and the automatic sprinkler system, and to the tenants for

their use in their businesses. The building does not furnish hot water for the productive processes of manufacturing tenants. The landlord likewise supplies radiator heat for the leased premises.

> "In general, the duties of the building service employees of said building are limited to heating said building, keeping it in repair, protecting it from damage, cleaning the public halls, stairways, and spaces occupied by the common utilities of the building, keeping the public lavatories clean, and operating freight and passenger elevators for the tenants, for the employees of the carriers who fetch goods from or deliver goods to tenants, for the employees of tenants and the freight which is always in the custody of employees of carriers—brought to and shipped out by the tenants, and, in general, said employees, in fact, confine their activities to the performance of said duties" (R. 328).

The building makes no repairs or alterations in leased premises except where it agrees to do so as a condition of signing or renewing a lease in order to adapt the leased premises to the requirements of the lease, and usually this work is done by outside contractors hired for such purpose. It is not the duty of the employees of the Arsenal Building to perform any work in the leased premises, except where it is necessary to do so for the general safety and preservation of the building, and the Arsenal Building employees so limit their activities, except occasionally when some of them do favors on their own time for tenants, for which the tenant tips them.

The Arsenal Building employees are compensated at rates in excess of those set forth in Section 6 of the Fair Labor Standards Act of 1938, but they are employed a number of hours weekly in excess of those set forth in Section 7 of that Act, and are not compensated for all such excess hours at the rate of time and one-half.

Questions Submitted for Review

9. In the light of the foregoing, your petitioners now desire to submit to this Court for review the following questions:

(a) Whether the Fair Labor Standards Act of 1938 is applicable to your petitioners and to the building service employees of the Arsenal Building.

(b) Whether said Act is applicable to your petitioners who are not themselves in any way engaged in interstate commerce or in the production of goods for interstate commerce, as such terms are defined by said Act.

(c) Whether the building service employees of the Arsenal Building are engaged in the production of goods for interstate commerce, or in processes or occupations necessary thereto, within the meaning of said Act.

(d) Whether your petitioners and the employees of the Arsenal Building are exempted from the application of said Act as service establishments by reason of the provisions of Section 13 (a) (2) thereof.

(e) Whether said Act, if applicable to your petitioners and to the employees of the Arsenal Building is unconstitutional and void for lack of Congressional power.

Reasons in Support of Petition

10. Your petitioners submit in support of their within petition the following reasons and arguments:

(a) The questions involved in this case are of widespread public interest, and of supreme importance to

many thousands of real estate owners and their service employees. The decision of the Court below, if upheld, will involve radical changes in the line of demarcation between Federal and State power, and a radical change in the present methods of doing business. It would bring under Federal jurisdiction the servicing of real estate by local owners where, through lease or otherwise, such real estate housed in part tenants producing goods for interstate commerce.

(b) Prevailing ideas, customs and practices among both employers and employees herein involved have been to the effect that the employees are all engaged in intrastate commerce, and not in producing goods for interstate commerce. This is borne out by a collective bargaining agreement entered into between two associations of employers, of one of which the Arsenal Building Corporation was and is a member, and Building Service Employees International Union, Local 32B, A. F. of L., made some eight months after the Fair Labor Standards Act was enacted, and over three months after it took effect, providing for total weekly earnings to be paid for a 47-hour week, and further by an arbitration award made over two years after the enactment of the law, providing for gross weekly earnings for a 46-hour week. Thus, the parties and the arbitrator confirmed the general customs, practices and prevailing thought in this industry that the Fair Labor Standards Act has no application.

(c) As pointed out in the opinion of the United States Circuit Court of Appeals for the Second Circuit, the decisions of state courts of last resort and Federal district courts are divided on this subject. The opinion in this case, moreover, clearly indicates a lack of conviction upon the part of the Court, for it is stated:

"Obviously the question will not be set at rest until the Supreme Court makes an authoritative ruling."

(d) The decision of the United States Circuit Court of Appeals for the Second Circuit to the effect that the building service employees of the Arsenal Building are producing goods for interstate commerce within the meaning of the Act is clearly erroneous. None of the building service employees ordinarily enters the demised premises of the tenant-manufacturers. For example, the elevator operators, who constitute a majority of the employees involved, at no time cross the threshold of the manufacturers' domain; they merely operate elevators which outsiders use to bring raw materials into the manufacturing premises before any work of production begins. After the manufacturing is completed the elevators are used to transport the finished products. The elevator operators do not touch or deliver either the raw materials or the finished product. They are no more a part of production than the public truckman who waits at the curb in the street below to deliver raw materials or to receive finished goods.

More particularly, the Court below was in error in that

(1) It held that it was immaterial that neither of your petitioners was itself engaged in interstate commerce or in the production of goods for interstate commerce.

(2) It held that the employees of the Arsenal Building were engaged in the production of goods for interstate commerce or in processes or occupations necessary to such production.

(3) It failed to hold that the employees of the Arsenal Building were not engaged in interstate commerce within the meaning of the Act.

(4) It held that neither your petitioners nor the employees of the Arsenal Building were exempt from the application of the Act within the meaning of Section 13(a) (2) of the Act relating to retail and service establishments.

(5) It failed to hold that the Act, if applied to your petitioners and to the employees of the Arsenal Building, is unconstitutional and void for lack of congressional power.

(e) The Court's attention is respectfully directed to the fact that the case of *I. B. Kirschbaum Company* v. *Philip B. Fleming*, referred to in the opinion of the court below, is now pending upon petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit and that there are differences in the opinions rendered therein and in this case, as well as in the facts upon which said opinions are based.

(f) The case involves, and the United States Circuit Court of Appeals for the Second Circuit has decided, important questions as to the interpretation and administration of the Fair Labor Standards Act of 1938 which have not been, but should be, decided by this Court. The public interest, therefore, will be promoted by the prompt settlement in this Court of such questions.

Conclusion

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court to the United States Circuit Court of Appeals for the Second Circuit, commanding said last named Court to certify and send to this Honorable Court a full and complete transcript of the record and all proceedings in the

within cause and to stand to and abide by such order and direction as to your Honors shall seem meet, and the circumstances of the case require, and that your petitioners may have such other and further relief or remedy in the premises as to this Court may seem proper.

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Counsel for Petitioners.

McLANAHAN, MERRITT, INGRAHAM & CHRISTY,
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Of Counsel.

Dated: February 5, 1942.

FILE COPY

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CLERK

IN THE

Supreme Court of the United States

October Term, 1941
No. 924

ARSENAL BUILDING CORPORATION
AND SPEAR & CO. INC.,
Petitioners,

AGAINST

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

BRIEF FOR PETITIONERS

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LEGAL ARTICLE.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

ARSENAL BUILDING CORPORATION and SPEAR & CO. INC., *Petitioners,* *against* L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor, *Respondent.*	No. 924

BRIEF FOR PETITIONERS.

Statement.

This case is before this Court on certiorari granted March 2, 1942.

By order filed March 16, 1942, L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, was substituted as party respondent in place and stead of Philip B. Fleming, resigned. There has been no other change of parties.

For convenient reference, the petitioners are sometimes referred to hereinafter as defendants, and respondent as plaintiff.

Respondent sought an injunction restraining petitioners from violating the Fair Labor Standards Act of 1938 (Act

of June 25, 1938, c. 676, 52 Stat. 1060, U. S. C. Title 29, Sec. 201 *et seq.*). The opinion of the United States District Court for the Southern District of New York denying relief (R. 330) is reported in 38 Fed. Supp. 207, and the opinion of the United States Circuit Court of Appeals for the Second Circuit reversing the District Court (R. 343) is reported in 125 Fed. 2d 278.

Jurisdiction.

Jurisdiction to review this case upon writ of certiorari is expressly conferred upon this Court by Judicial Code, Sec. 240, as amended (Act of March 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Act of March 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; U. S. C., Title 28, Sec. 347).

Specification of Assigned Errors.

The Circuit Court erred as follows:

1. In holding that the employees of the Arsenal Building Corporation produced goods for commerce within the meaning of the Act.
2. In holding that Arsenal Building Corporation and Spear & Co. Inc. produced goods for commerce within the meaning of the Act.
3. In holding that the employees of the Arsenal Building Corporation were not employees of a service establishment within the meaning of the Act.
4. In failing to hold that the Act was not applicable to defendant's employees because their employer was not itself engaged in commerce, or the production of goods for commerce.

5. In omitting to hold that the Act, as interpreted by the Circuit Court, was unconstitutional for lack of congressional power.

Findings of Fact.

(R. 326-9)

The defendants are both New York corporations. The Arsenal Building Corporation owns a twenty-two story loft building in New York City, which, in turn, is managed by defendant, Spear and Company, as Agent.

With minor exceptions, the tenants, and their employees, operate in said building, in the production of ladies' garments for interstate commerce, and the purchase and sale of ladies' garments for interstate commerce but there is no business relation between the tenants and either of the defendants other than that of landlord and tenant.

The sole business of the Arsenal Corporation is that of a real estate operation in leasing space in said building and rendering service incident thereto.

The sole activity of defendant, Spear and Company, in said building is its management and operation thereof as a loft building to be leased.

In this connection, Arsenal Corporation, through Spear and Company, employs about twenty-six employees to supply the ordinary type of service incident to the operation and maintenance of such a building. These employees service and maintain the building as a whole, but do not render service to the tenants, or care for the leased premises, except to operate passenger and freight elevators, and, occasionally, to enter these premises in case of leaks or fire, and to repair windows, when damage to the building as a whole is threatened. The keys of the leased premises are in the custody of the tenants and none of the employees of defendant, Arsenal Corporation, have access to them, or to the leased premises.

> "None of the employees of Arsenal Building Corporation produces, manufactures, mines, handles, processes, or in any other manner touches, for the purpose of production, or works upon the goods produced by any of the tenants of Arsenal Building Corporation, and none of said employees transports any of said goods, except that some of said employees, as an incident to the general operation of said building, operate elevators which carry said goods of said tenants" (R. 327).

The duties of the twenty-six employees are briefly outlined.

The superintendent directs the building service employees and performs certain mechanical and maintenance work.

The building mechanic or handyman performs odd jobs around the building other than in the leased premises and assists the superintendent.

The freight elevator starter directs the five freight elevator operators in respect to their operation of four freight elevators. From time to time he relieves one of said freight elevator operators in the operation of an elevator.

One elevator starter and one assistant starter direct six operators, in the operation of the five passenger elevators and on occasion the assistant starter relieves one of the said elevator operators.

Six porters clean, polish and otherwise maintain public halls, stairways, lavatories, etc., and on occasion, as relief men, operate an elevator.

Two watchmen patrol the public places, perform some cleaning work, and on occasion operate an elevator.

Two firemen care for boilers, pumps and like equipment.

Arsenal Corporation buys electric current from the Consolidated Edison Company, and resells it to tenants through facilities furnished by a sub-metering company.

The building furnishes water for the public lavatories and the automatic sprinkler system, and to the tenants for their use in their businesses. (This does not mean hot water for the productive process of manufacturing tenants as stated by the Circuit Court). The landlord likewise supplies radiator heat for the leased premises.

> "In general, the duties of the building service employees of said building are limited to heating said building, keeping it in repair, protecting it from damage, cleaning the public halls, stairways, and spaces occupied by the common utilities of the building, keeping the public lavatories clean, and operating freight and passenger elevators for the tenants, for the employees of the carriers who fetch goods from or deliver goods to tenants, for the employees of tenants and the freight which is always in the custody of employees of carriers—brought to and shipped out by the tenants, and, in general, said employees, in fact, confine their activities to the performance of said duties" (R. 328).

The building makes no repairs or alterations in leased premises except where it agrees to do so as a condition of signing or renewing a lease, in order to adapt the leased premises to the requirements of the lease, and usually this work is done by outside contractors hired for such purpose. It is not the duty of the employees of the Arsenal Corporation to perform any work in the leased premises, except where it is necessary to do so for the general safety and preservation of the building, and the Arsenal Corporation employees so limit their activities, except occasionally when some of them do favors on their own time for tenants, for which the tenant tips them.

The Arsenal Corporation employees are compensated at rates in excess of those set forth in Section 6 of the Fair Labor Standards Act, but they are employed a number of hours weekly in excess of those set forth in Section 7 of that Act, and are not compensated for all such excess hours at the rate of time and one-half.

Upon these facts the District Court denied relief, holding that neither the defendants nor the building service employees were engaged in commerce or in the production of goods for commerce, and that defendants were service establishments exempted from the law.

The Circuit Court of Appeals, in an opinion, which we submit is unconvincing and lacks conviction, reversed the decision of the District Court and ruled seriatim as follows:

1. The employees in question are engaged in the production of goods for commerce because they are engaged in the performance of services which are appropriate to manufacture, and because warm and clean buildings, light and power and elevator transportation from one story to another constitute services as necessary to production as the services of cutters and stitchers in the production of garments.

2. The employees are not exempted from the Act as employees of a "service establishment" because the test is as to whether the servicing is of an interstate or intrastate character, and, therefore, since these employees are engaged in producing goods for interstate commerce, they are not exempt as a "service establishment".

3. The argument of the defendants that the defendant-employer as well as the employees must be but was not engaged in commerce, or the production of goods for commerce, was rejected. The Court reached the astounding conclusion that a landlord and his managing agent are engaged in producing goods.

4. Having disposed of the case, on the ground that the employees were engaged in the production of goods for commerce, the Circuit Court did not find it necessary to decide the question as to whether the employees were actually engaged in commerce.

Argument.

In opposing the conclusions of the Circuit Court the defendants submit their argument under the following captions:

I.

According to established decisions, this Court will not infer a Congressional intention to invade State sovereignty in respect to the local control and regulation of real estate.

II.

The employees of Arsenal Building Corporation are not engaged in the production of goods for commerce within the meaning of the Act.

III.

The employees of Arsenal Building Corporation are not engaged in commerce within the meaning of the Act.

IV.

The employees of Arsenal Building Corporation are engaged in working in a "service establishment" exempted from the Fair Labor Standards Act.

V.

The Act applies only to employees of employers engaged in commerce, or the production of goods for commerce, and then only to such of said employees as are themselves engaged in commerce, or the production of goods for commerce.

VI.

If the Act were interpreted to apply to the employees of the Arsenal Building Corporation, it would be void for lack of Congressional power.

POINT I.

According to established decisions this Court will not infer a Congressional intention to invade State sovereignty in respect to the local control and regulation of real estate.

In the recent case of *Federal Trade Commission* v. *Bunte Brothers Inc.*, 312 U. S. 349, this Court considered Section 5 of the Federal Trade Commission Act, giving the Commission power to prevent "unfair methods of competition in (interstate) commerce". The precise question was whether the Commission could forbid unfair methods of competition in purely intrastate transactions upon the ground that such transactions affected interstate commerce. This Court held that the Commission had no such power, stating (p. 351):

> "When in order to protect interstate commerce Congress has regulated activities, which in isolation are merely local, it has normally conveyed its purpose explicitly. See for example, National Labor Relations Act * * * Bituminous Coal Act * * * Federal Employers Liability Act * * * ."

Again, this Court said (p. 355):

> "And we merely hold that to read 'unfair methods of competition in (interstate) commerce' as though it meant 'unfair methods of competition in any way affecting interstate commerce' requires in view of all the relevant considerations, much clearer manifestation of intention than Congress has furnished."

Another example is the comparison between the National Labor Relations Act, on the one hand, with the Sherman Anti-Trust Act, and the Fair Labor Standards Act. As pointed out in the opinion of Judge WOOLSEY in the District Court, the bill which led to the Fair Labor Standards Act covered all production "affecting commerce", but this broad language was finally abandoned so that the Act was limited to employers and employees in interstate commerce and the production of goods for interstate commerce.

83 Cong. Rec. 9246;
Law and Contemporary Problems, Duke University, Summer, 1939, issue, pp. 338-9.

This left a marked contrast between the broader language of the National Labor Relations Act, which extends to employment relations in occupations "affecting" interstate commerce, and the Fair Labor Standards Act. The significance of this contrast becomes clear upon reading the case of *Apex Hosiery Company* v. *Leader*, 310 U. S. 469, where it was pointed out that the Sherman Anti-Trust Law, unlike the National Labor Relations Act, did not apply to all situations "affecting" commerce. The deliberate removal of the words "affecting commerce" after Congress had before it one Act with those words, and another Act without those words, would seem to be a clear indication of its intention to confine this legislation to the same limits as were covered by the Sherman Anti-Trust Law.

Jewel Tea Co. v. *Williams*, 118 Fed. (2d) 202;
Fleming v. *Goldblatt Bros. Inc.*, 39 Fed. Supp. 700.

It certainly would require compelling words to impute to Congress the intention of taking over the control of employment relations of elevator operators in New York buildings, for such an effort would be revolutionary and would raise grave constitutional questions.

Bearing in mind the historical background of the Act, the recital in Section 2 that it is aimed at "industries engaged in commerce or in the production of goods for commerce", with a view to protecting labor against sub-standard competition through interstate commerce, we submit that the interpretation urged in this brief meets all the requirements of liberal construction which should be given to remedial statutes, and is more consonant with the general concept and purpose of the Act than is the strained impractical contention of the plaintiff with its inroads upon state rights. The management and operation of buildings is essentially a local business, the last of which Congress would be presumed to regulate. The cost of building service is such a small part of the cost which a manufacturing tenant has to pay as reflected in his rent, that it is negligible (R. 232-3). Taxes and mortgage interest are a far greater item of expense, and certainly Congress would not feel that it should regulate them, on the ground that it affected the price of the goods manufactured by a tenant in a building which is subject to the burdens of taxation and mortgage interest.

On this point the Court should also consider the cases reviewed in Point II of this brief, to the effect that Acts of this nature are not presumed to extend to independent facilities even though they may be part of a step in an interstate course of trade.

The history of the decisions and legislation in respect to the Second Federal Employers' Liability Act further bear out this same conclusion. As that act was originally passed it was interpreted by the Court to exclude employees rendering incidental services connected with interstate transportation and commerce.

Delaware, L. & W. R. Co. v. *Yurkonis*, 238 U. S. 439 (coal mining);

Chicago & E. I. R. Co. v. *Ind. Comm.*, 284 U. S. 296 (maintenance);

Shanks v. *Delaware L. & W. R. Co.*, 239 U. S. 556 (maintenance);

Chicago B. & Q. R. Co. v. *Harrington*, 241 U. S. 177 (coaling an engine);

Minneapolis & St. L. R. Co. v. *Nash*, 242 U. S. 619 (carpenter on depot);

Southern R. Co. v. Taylor, 16 Fed. 2d 517 (elevator operator in railroad office building).

Following these decisions the matter again came before Congress with a view to so broadening the Act as to cover some of the very activities which in the foregoing decisions had been held excluded. The Act was thereupon amended so as to cover employees, any part of whose duties are in "furtherance of interstate commerce", or "in any way directly or closely or substantially affect such commerce".

Act of August 11, 1939, c. 685, 53 Stat. 1404, U. S. C. Title 45, Sec. 51.

Another illustration of this same principle is found in the history of the Interstate Commerce Act and the judicial pronouncements in respect thereto. In the case of the *Illinois Central Railroad Company* v. *Public Utilities Commission*, 245 U. S. 493 (1917), at page 510, the Court held:

> "In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a State, even where that may be done, unless and except so far as its purpose to do so is clearly manifested. *Reid*

v. *Colorado*, 187 U. S. 137, 148; *Cummings* v. *Chicago*, 188 U. S. 410, 430; *Savage* v. *Jones*, 225 U. S. 501; *Missouri, Kansas & Texas Ry. Co.* v. *Harris*, 234 U. S. 412, 419."

Because of this doctrine,—since the Court had previously held in *Houston & Texas Railway* v. *U. S.*, 234 U. S. 342, at page 357, that the Interstate Commerce Act at that time did not fully extend to intrastate traffic in certain important particulars,—the next act of Congress dealing with this subject, which was the Transportation Act of February 28, 1920, remedied the situation by providing specifically (c. 91, Sec. 416, Pars. 3 and 4; 41 Stat. 484, Pars. 3 and 4; U. S. C., Title 49, Sec. 13, Pars. 3 and 4) for the broader inclusion of intrastate rates under certain regulations and conditions. The history of this development is set forth in the statements of Senator Cummings of Iowa in connection with the discussions of a bill which ended in the Transportation Act, when he was speaking as Chairman for the Senate Committee having the act in charge (59 Cong. Rec., pp. 141-3).

Following the recognized judicial pronouncements in respect to legislation of this character,—whether we consider the Federal Trade Commission Act, the Sherman Anti-Trust Law, the National Labor Relations Act, the Employers' Liability Act, the Interstate Commerce Act, or the Fair Labor Standards Act,—it appears to be settled law that Congress will not be presumed to intend to go beyond the interstate field and to enter the field of intrastate activities which affect interstate commerce unless the intention so to do is clearly expressed in the statute.

POINT II.

The employees of Arsenal Building Corporation are not engaged in the production of goods for commerce within the meaning of the Act.

The Circuit Court ruled that the service employees of the landlord-defendant were engaged in the production of goods for commerce within the meaning of Section 3(j) of the Act and rested its decision primarily on that conclusion. With this ruling we take issue.

The employees of Arsenal Building Corporation do no work on the manufacturers' premises, or on their products and in no sense are a part of the manufacturing enterprises. The elevator operators, like truckmen on the public streets, operate vehicles which carry raw materials to the threshold of the producer's premises before production begins, and which, thereafter, carry away the finished product after it has crossed the threshold of the producer's premises to the public corridors. Unlike independent truckmen, these vehicles of vertical transportation, and their operators, do not even cross the manufacturers' property line in performing this function. Occasionally, like truckmen on a public street, they may perform a like function on goods in a semi-finished state, in order that they may be taken to some outside contractor in some other building to perform some work thereon, and may then be returned to the original manufacturer either as a partly or wholly finished product. Even then, it is merely a means of bringing the goods to a place where they can be produced, and taking them away after they are produced. None of this service, however, is an incident to production. It is applied before the function of the receiving clerk begins and after the function of the shipping clerk is finished.

Section 3(j) of the Act reads as follows:

> "'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

In construing this paragraph of the Act, we prefer to present two alternative arguments, as follows:

A. Section 3(j) covers only employees who actually produce, transport or work on the goods for commerce in the course of their production, or who do the equivalent by working on "any process or occupation necessary to the production thereof"; it, therefore, excludes employees who perform service before production begins, or after production ends, as well as incidental employees in a factory who are not directly identifiable with the production of a particular lot of goods.

B. Certain marginal employees not directly connected with production may be covered when directly employed by the producer as a part of the production establishment, but are not covered when employed by a local employer operating elsewhere and independently in another line of business, but taking contracts from the prime producer.

A.

Section 3(j) covers only employees who actually produce, transport or work on the goods for commerce in the course of their production, or who do the equivalent by working on "any process or occupation necessary to the production thereof"; it therefore excludes employees who perform service before production begins or after production ends, as well as incidental employees in a factory who are not directly identifiable with the production of a particular lot of goods.

It is conceded that all employees of the production establishment are not covered, as the Act was carefully drafted to exclude employees not actually engaged in production of goods for commerce.

Senator Pepper, one of the conferees on this Act, made this clear by stating on the floor of the Senate (83 Cong. Rec. 9168):

> "The conference committee had before it the question of whether this proposed law should be applied to all employees of an industry which itself is engaged in interstate commerce although the individual employees may not necessarily themselves be engaged in interstate commerce or whether its application should be applied or made to the employees themselves who were engaged either in interstate commerce or in the production of goods for interstate commerce.
>
> * * * * * *
>
> "I want it distinctly stated that this proposed law is not applicable to all employees of an industry which itself is engaged in interstate commerce. It is applicable only to those employees who themselves are engaged either in interstate commerce or the production of goods for interstate commerce, and the contrary theory was definitely rejected by the committee."

As pointed out in Section 15(b), employment in the production establishment is only *prima facie* proof that the employee was engaged in the production of the goods. The statute, moreover, in Section 3(j), emphasizes the point by limiting the act to employees "necessary" to production; and what may, in a broad way be necessary for a business *enterprise*, may not be necessary for production.

> *Abadie* v. *Cudahy Packing Co.*, 37 Fed. Supp. 164 (La., 1941).

At no time during this litigation has our adversary indicated which employees of a manufacturing establishment producing for commerce are in the exempted class.

The Walsh-Healey Act (Act of June 30, 1936, c. 881, 49 Stat. 2036-39, U. S. C., Title 41, Sections 34-45) provides that in certain Government contracts there must be inserted a stipulation:

> "That all persons employed by the contractor in *the manufacture or furnishing* of the materials" etc. (Sec. 1(b))

must be paid a certain minimum wage. But the Administrator of the Act has ruled that employees not engaged in manufacturing, handling, supervising or shipping such materials as well as custodial employees are not covered by the Statute.

We contend that bookkeepers, typists, trained nurses, doctors, dentists, restaurant waiters, maintenance employees and the like—even when employed in the production establishment—are not engaged in an occupation necessary to production of goods earmarked for interstate commerce. Their services are too general and indirect to be allocated to the goods which the statute pursues. Our contention as to the interpretation of the word "transporting", and the words "process or occupation necessary to the production", as used in Section 3(j), all stem from the same

argument that this subdivision is merely a definition of the word "produced", and of those "engaged in the production of goods". The entire paragraph is designed to cover all activities of workers having immediately to do with production of goods for commerce and nothing more.

It is employee contribution to the production of goods which is the test—not his association with the enterprise. The Act follows the goods. It has no application unless the goods enter interstate commerce. It excludes from its application any employee in a factory who is not identified with the production work of goods for commerce. If the service performed, like that of truckmen, is before production begins, or after it ends, the employee is obviously not covered. Moreover, the fact that he works in the place where and while the goods are produced is only *prima facie* proof that he helped to produce the particular goods. He must be a production employee rather than an employee whose wages would ordinarily be charged to overhead. He must actually be so engaged in the production of such goods, that he is identified with goods intended for interstate commerce; not one performing service of such a general or indirect nature that it applies to the operation of the enterprise as a whole without relationship to particular goods or lots of goods. The services must be *necessary to production.* Bookkeepers, clerical help and watchmen are not ordinarily of that class. They no more contribute to production than does the toolmaker to bookkeeping.

With these facts and claims in mind, let us analyze the language of Section 3(j) more in detail. All of its language, including the word "transporting", relates to services ordinarily performed in or about the production—not services affecting production. An employee is "engaged in the production of goods", if he is employed in "handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof *in any State*". These are local activities in fabricating the goods or in handling or moving the

goods as a part of the manufacturing process or enterprise. Outside transportation is not necessary to the production process. It does not necessarily take place merely "in any State." Like commerce, as distinguished from manufacturing, it is not production.

Anderson v. *Shipowners' Ass'n.* 272 U. S. 359;
U. S. v. *Knight*, 156 U. S. 1;
New York ex rel. Pa. Railroad Co. v. *Knight*;
192 U. S. 21.

The word "transporting" connected with production merely applies to the movement of goods in or around the producing plant, and was one of a series of words designed to cover every form of activity directly incident to production of the particular goods in question in the plant. The operation of cranes, pushcarts and electrically driven cars, which are all incident to production, would be embraced by the word "transporting." On the other hand, when the goods are completed to the extent that the producing plant finishes its work in connection therewith, and they are shipped out to be carried to customers, either through vertical or horizontal transportation, this provision relating to production has no application. When independent truckers, hired by the Garment Manufacturers, call at the manufacturers' premises for the goods, and place them on the elevators, and then on their trucks, they act only after the application of this definition of "production of goods" is exhausted. That movement is not a part of production and is not a process or occupation necessary to production any more than banking or credit is production. That movement only commences after production ceases and the manufactured product has left the manufacturers' premises.

By including "any process or occupation necessary to the production thereof in any State", Congress was aiming

only to catch all production activities in goods for interstate commerce. Processing, as used here, and as disclosed by the dictionaries, is a part of manufacturing or production.

Lakeshire Cheese Co. v. *Shefford Cheese Co.*, 72 Fed. 2nd 497, 499;
Smith Eng. Works v. *Nordberg Mfg. Co.*, 68 Fed. 2nd 492, 493;
Fleming v. *Hawkeye Pearl Button Co.*, 113 Fed. 2nd 52.

An occupation necessary to production would include an employee standing around as a helper, or mixing ingredients for the use of other productive employees working on goods for commerce, but no "process or occupation" entirely separate and independent from production of particular goods, even though it might be essential for the operation of the enterprise, is intended to be covered. Independent contractors to wash windows, press uniforms and audit books, are therefore outside the scope of this section.

We contend that it is not enough to show that the employing company is engaged in producing goods for interstate commerce, and that the employee is employed by the company in some capacity. It must be further shown by *prima facie* presumption or otherwise that the particular employee is actually engaged by his employer in producing definite lots of goods for commerce.

Rogers v. *Glazer*, 32 Fed. Supp. 990 (1940);
New Amsterdam Co. v. *Commission*, 89 Okla. 7; 193 Pac. 974;
Baggett v. *Henry Fischer Packing Company*, 37 Fed. Supp. 670.

There are also fundamental arguments against stretching this definition of the word "produced" to include local activities involving the care and servicing of real estate where it appears that such activities are not a part of production, and are performed by an independent contractor whose enterprise is not production or commerce.

Brandell v. *Continental Illinois Bank and Trust Co.*, Fed. Supp. ;
5 Labor Cases, C.C.H. par. 60, 876 (U. S. D. C., N. D. Ill. Dec. 5, 1941);
Cecil v. *Gradison*, Ohio App. ;
5 Labor Cases, C.C.H. par. 60, 799 (Ohio Ct. Appeals, Nov. 17, 1941);
Merryfield v. *Hoyt Shoe Co.*, 41 Fed. Supp. 794;
Pederson v. *Fitzgerald Construction Co.*, 262 App. Div. 665;
Robinson v. *Massachusetts Mutual Life Insurance Co.*, 158 S. W. 2d 441 (Tenn. Sup. Ct. 1941).

Moreover, as urged in Point I, *supra*, by removing the words "affecting commerce" from the bill, Congress indicated an intent for a narrower application of the Act.

B.

Certain marginal employees not directly connected with production may be covered when directly employed by the producers as a part of the production establishment, but are not covered when employed by a local employer operating elsewhere and independently in another line of business, but taking contracts from the prime producer.

It is only after rejecting our Point "A" that it is necessary in this case to consider this Point "B". Headnote "B" reflects the doctrine of the New York Appellate Division in the case of *Killingbeck* v. *Garment Center Capitol, Inc.*, 259 A. D. 691. Certainly, there would be no *prima*

facie presumption that employees of an independent employer were covered under Section 15(b). The practical common sense of this limitation, if our contention under "A" is rejected, is easily illustrated by the situation of waiters in restaurants. If the waiters were in a restaurant maintained in the factory by the manufacturers, there is one situation. If the waiters are employed in a nearby restaurant which depends largely on the patronage of employees who work in a factory producing goods for interstate commerce, the picture is quite different from a realistic point of view. The employees fed at the public restaurant may have spent half the morning producing goods for interstate commerce, and half the morning producing goods for intrastate commerce. Unless the act of the restaurant employees in feeding the manufacturers' employees can be identified with the production of particular goods for commerce, they cannot be covered. It is, therefore, beyond reason to adopt such a construction, or to impute to Congress an intention of such a character. On the other hand, if we apply the Act to employees of a restaurant operated incidentally in connection with the factory, we have at least the provision that they are *prima facie* presumed to have produced the goods for commerce.

This argument of defendants does not mean that a manufacturer might escape the Act, as applied to employees in some departments, by subcontracting to a local employer the work of performing some of the production processes. Thus, the garment manufacturer might not circumvent the Act by disintegrating his establishment and giving to separate contractors the work of (1) dyeing, (2) cutting, and (3) sewing. Our contention on this point does not go so far. It does not need to be extended to employees of local manufacturers who actually work on or produce the goods for commerce.

But even that question is not now presented. For the purpose of this case it is only necessary to contend that such incidental employees, as clerks, stenographers, restaurant waiters, watchmen and cleaning women, whose services cannot be identified with particular goods, are one step further from coverage when employed by independent local employers, and that any construction of the Act, which would include them, would run counter to the presumable intention of Congress, and would wreck the Act on the reef of unconstitutionality. Such employees are neither connected with the employer or the goods having to do with interstate commerce.

If we test the question by the scope of the production enterprise of a particular manufacturer, the argument goes further. The manufacturer of buttons, the manufacturer of garments who produces his own buttons, and the manufacturer of garments who buys his buttons, present different pictures. Some manufacturers have vertical integration and some do not. It is the scope of their particular production activities which is important. In the case of the garment manufacturer who makes his own buttons, the production of garments includes the buttons. In the case of the garment manufacturer who buys his buttons, the manufacture of buttons does not come within his production process, and the status of the employees who make buttons, depends on the business and decisions of their employer, and not upon what is done from day to day by his ever changing group of customers. Otherwise, the status of the wool grower and flax grower would be controlled by the ultimate flow of the garments made from the cloth, made from the linen and wool produced by the grower. Or more complicated still, the status of each employee producing wool might depend upon whether that wool was to be used for goods in interstate commerce or intrastate commerce.

To state our contention in another way, we urge that employees of independent contractors engaged in the local business cannot logically be brought within the purview of the Act, by reason of some unstable and fortuitous connection between that local employer and some other employer producing goods for interstate commerce. The character of that local business, and the laws under which its employees work, should not be subject to variable and changing decisions of others over whom the local contractor has no control. Thus, the manufacturer of sandpaper, or one who paints kitchen cabinets produced by others, may understand that the particular goods he is producing or working upon during the current week are to be used by the prime producer for interstate commerce. It may happen, however, that after the sandpaper is delivered, or the merchandise painted, the prime producer changes his mind and uses the sandpaper or cabinets in a way which does not concern interstate commerce. Likewise, the reverse may be true, and the painter or sandpaper manufacturer may perform without regard to federal law in the belief that the services rendered, or materials sold, relate to goods to be delivered within the state, but subsequently the buyer or prime manufacturer may change his mind. Thus, through the changing decisions and business policies of the customer of the local employer, over which the local employer has no control, the legal status of the local employer, and his employees, may be shifted from time to time.

A like difficulty is presented if the manufacturer of sandpaper, or any other manufacturer, produces for inventory without knowledge or intention as to whether the accumulated inventories will ultimately become a part of a product for interstate commerce or intrastate commerce. In many lines of manufacture, it becomes financially and socially desirable over long periods of time to accumulate large

inventories, with a view to smoothing out the fluctuations of seasonal employment, and preparing for speedy deliveries during peak periods.

It, therefore, seems reasonable to argue that the employees of an independent local producer, or contractor, do not ordinarily come under the Act, merely because they enjoy the patronage of others who produce in part for interstate commerce or furnish them with goods, service or space.

Puget Sound Stevedoring Co. v. *Tax Commission.* 302 U. S. 90.

The conclusion of the Administrator and of the Court below, that it is immaterial whether the services are rendered by the producer or an independent contractor offers no solution to the problem. The arguments in favor of this conclusion suggest no practical limitations or boundaries and therefore become useless as furnishing a rule or principle of any value. The validity of our decision must depend on its line of exclusion as well as inclusion. If as is the case so far with the decisions upholding the Administrator no line of demarcation and no terminal facilities are visible it becomes evident that the problem has not been met.

Plaintiff has relied upon the case of *Hall* v. *Warren-Bradshaw Drilling Co.*, 40 Fed. Supp. 272; aff'd 124 Fed. 2d 42, where it was held that the employees of a drilling company were covered when they were engaged in drilling to "bring in" an oil well which was later to be operated by another company in producing oil for interstate commerce. If plaintiff means, as he seems to mean, that all construction work in connection with some contemplated enterprise, and before the structures are actually put into operation for commerce, are covered by the Act, then we

submit that the decision is unsound and in conflict with well-known principles laid down in numerous cases.

New York Central R. R. v. *White*, 243 U. S. 188.

Appellant has admitted that the Act cannot apply to employees of hotels or apartment houses (R. 262). But why not? If restaurant employees feeding those employees who at times produce goods for commerce are covered, why not cooks and dining room employees of hotels, and if feeding employees is a part of the process of producing goods for commerce, does not the same argument apply to the housing of such employees? The plaintiff leaves the defendants and this Court—as he did the Court below—absolutely in the dark as to the rule which he applies in reaching what appear to be such conflicting conclusions.

POINT III.

The employees of Arsenal Building Corporation are not engaged in commerce within the meaning of the Act.

In view of its decision that the employees of the Arsenal Building are employed in producing goods for commerce the Circuit Court found it unnecessary to decide whether or not they were engaged in commerce. There is every reason to assume, however, that this point will be urged by the Administrator.

The complaint, as it was originally filed, contained no contention that the Arsenal Corporation employees were engaged in commerce, but relied solely on the contention that they were engaged in the production of goods for commerce. In March of 1941, however, the complaint was amended to cover this point.

According to Section 3(b) of the Act, "commerce" means "trade, commerce, transportation, transmission or communication among the several states or from any state to any place outside thereof". Isolated transactions, we submit, do not come within the statute's definition of "commerce".

Putting aside for the moment the duties of porters, carpenters and watchmen, we come frankly to grips with this contention by dealing with elevator operators, whose duties represent the strongest case for the contention that the employees in question are engaged in commerce. The elevator operators merely operate a local facility within the building. Truckmen, employed by independent contractors engaged by the tenants, come upon the leasehold premises of the manufacturing tenants, and there take possession of the goods to be shipped, by loading them into elevators which take them to the ground floor. These same truckmen then unload the goods, carry them to the street, and put them on the trucks. The elevator operators merely operate the elevators and, in the ordinary course of their duties, do not handle the goods or even cross the property line of the tenants. Such employees, we submit, are not engaged in "commerce" within the meaning of the statutory definition of that word.

In the case of *New York ex rel. Pa. Railroad Co.* v. *Knight*, 192 U. S. 21, the Court had before it the constitutionality of a franchise tax imposed by the State of New York on a cab service owned and operated by the Railroad Company from points in the City of New York to railroad terminals. The Railroad urged that such cabs were engaged in interstate commerce and were, therefore, immune from state taxation. This Court, in a unamious opinion by Mr. Justice Brewer, said, at page 28:

> "As shown in the opinion from which we have just quoted, many things have more or less close relation to interstate commerce which are not prop-

erly to be regarded as a part of it. If the cab which carries the passengers from the hotel to the ferry landing is engaged in interstate transportation, why is not the porter who carries the traveler's trunk from his room to the carriage also so engaged? If the cab service is interstate transportation, are the drivers of the cabs and the dealers who supply hay and grain for the horses also engaged in interstate commerce? And where will the limit be placed?"

See also:

U. S. v. *Baltimore & O. S. W. R. Co.*, 222 U. S. 8;
Heitler v. *U. S.*, 244 Fed. 140;
Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor on S. 2475 and H. R. 2700, 75th Congress, First Session (1937) at p. 43.

The remarkable similarity between the language used in the Quarantine Statute, and the White Slave Act, dealt with in the two cases last above cited, when compared with the language used in the definition of "commerce" in the Fair Labor Standards Act, gives these cases special force.

This argument, treating the elevator service as a separate movement, has particular force where the intrastate movement is contracted and paid for independently of the interstate movement.

Puget Sound Stevedoring Co. v. *Tax Commission*, 302 U. S. 90.

In the light of the argument set forth in Point I (*supra*), we submit that the foregoing decisions are conclusive in favor of the defendants.

POINT IV.

The employees of Arsenal Building Corporation are engaged in working in a "service establishment" exempted from the Fair Labor Standards Act.

The Circuit Court ruled that defendants were not a service establishment but were actually engaged in producing goods for commerce. If practical common use of words and concepts are of value this holding cannot stand.

At the close of the testimony, defendants, pursuant to Rule 15 of the Rules of Civil Procedure, and with the approval of the Court, amended their answer to allege an additional affirmative defense as follows:

> "That the defendant Arsenal Building Corporation and the defendant Spear & Company, Inc. as its agent, are engaged in the operation of a service establishment within the meaning of Section 13 (a) (2) of the Fair Labor Standards Act, and are therefore exempted from the application of the Act" (R. 254).

The section of the Act referred to by the amendment is as follows:

> "Section 13(a). The provisions of sections 6 and 7 shall not apply with respect to
>
> * * * * *
>
> (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; * * *"

The legislative history of the Act tends to support our exemption claim.

Although the original Bills contained no specific exemption for service establishments (see for example the House Bill as contained in Report No. 2182, House of Representa-

tives 75th Congress, 3rd Session, April 21, 1938 to accompany S. 2475, at page 4) it was clear that Congress did not intend to legislate with respect to such matters. Thus, the Hon. ROBERT H. JACKSON, testified that:

> "It was not intended by this Bill to apply generally to retailers or to apply to the service trades, such as the filling station attendant and the pants presser and small business generally."

Further, Mr. Jackson testified:

> "• • • but, generally speaking, the policy of the Bill is not to include the service trades and small businesses and the retailing enterprises."

Again, Mr. Jackson stated that the purpose of the legislation was to leave——

> "to the State and local communities themselves the power of regulating the small business units that affected the local community only."

Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor on S. 2475 and H. R. 2700, 75th Congress, 1st Session (1937) pages 35, 36.

At another place, he added:

> "• • • but, as I said at the outset under Senator Black's question, it is not intended by this Bill to affect the retail trades or the service trades. It is intended to catch the unfair labor practices *at the point of production.*" (Italics supplied.)

Joint Hearings Before the Senate Committee on Education and Labor and the House Committee on Labor on S. 2475 and H. R. 2700, 75th Congress, 1st Session (1937) pp. 39-40.

Further evidence that the Act was not intended to extend to service trades and other local businesses is found in the Report of the Senate Committee on Education and Labor which recommended passage of S. 2475. The report stated:

> "The bill carefully excludes from its scope *business* in the several States that is *of a purely local nature.* It applies only to the industrial and business activities of the Nation in so far as they utilize the channels of interstate commerce, or seriously and substantially burden or harass such commerce. *It leaves to State and local communities their own responsibilities concerning those local service and other business trades that do not substantially influence the stream of interstate commerce.* For example, the policy in this regard is such that it is not even intended to include in its scope those purely local and small business establishments that happen to lie near State lines, and solely on account of such location, actually serve a wholly local community trade within two States." (Italics supplied.)
>
> *Report of the Senate Committee on Education and Labor to accompany S-2475*, 75th Cong. 1st Sess. Senate Cal. No. 905, Report No. 884 at page 5.

Furthermore, Senator Black then Chairman of the Senate Committee made clear that there was no intention of regulating local business units. He stated:

> "The general purpose of the bill, legislatively speaking, is a three fold one:
>
> "It provides a method of obtaining the objectives of minimum wages and maximum hours in industries throughout the Nation which engage in the transportation of *their* goods in interstate commerce. It is not intended to, and does not, attempt to provide by Federal legislation the fixing of minimum wages and maximum hours of employment in all the varied peculiarly *local business units* of the Nation." (Italics supplied.)

This same idea was reiterated and emphasized a few paragraphs later, where he said:

> "So the bill, in so far as it relates to maximum hours of employment and minimum wages, is limited, except to the small extent I have heretofore indicated, to goods which are actually manufactured for transportation and are transported in interstate commerce. We therefore eliminate in the beginning any idea that this is an effort to regulate wages and hours in *the various service employments* throughout the Nation.
>
> "That is done for two reasons. In the first place, the bill rests squarely upon the interstate-commerce clause of the Constitution. In the second place, I believe it was the prevailing sentiment of the committee, if not the unanimous sentiment of the committee, that *businesses of a purely local type which serve a particular local community*, and which do not send *their* products into the stream of interstate commerce, can be better regulated by the laws of the communities and of the States in which the business units operate." (Italics supplied.)

81 Cong. Rec., page 7648.

The specific exemption, as it now exists in the Act, appeared for the first time in the draft of the statute contained in the Conference Report.

> Report No. 2738, House of Representatives, 75th Congress, 3rd Session, June 11, 1938, Conference Report (to accompany S. 2475) p. 9.

As pointed out on the floor of Congress, by Congressman Celler, the specific exemption was inserted to make sure that the legislative intent alluded to above would be made effective.

82 Cong. Rec. 7438.

From the fact that the Act contains no definition of "service" or "servicing", it is apparent that the Congress intended that these terms should be given a common sense interpretation, consistent with the basic purpose the Congress had in mind: that of excluding from the operation of the law local businesses with which only the local community is concerned.

* * * * *

It is noteworthy that the labor union which represents the employees here involved for purposes of collective bargaining is called the Building Service Employees International Union (R. 68), and is dealt with by the State, and not the National Labor Board (R. 265). Likewise, the industry in which this labor union operates is almost without exception referred to as the Building Service Industry. In situations of this character, the common appellations coined and used by the parties entirely apart from any thought of legislative control should be entitled to weight.

Mr. Justice Holmes, speaking for this Court in the case of *Marcus Brown Holding Co.* v. *Feldman*, 256 U. S. 170, stated that "*services*" of the nature of those performed by the employees involved in this case

> "constitute the universal and necessary incidents of modern apartment houses" (256 U. S., at page 199).

Plaintiff admits that apartment houses and hotels are service establishments within the meaning of Section 13 (a) (2) (R. 262), and yet there is no difference whatever between such buildings and a loft building as respects the character of the jobs performed by the employees. All of these buildings, where real estate is leased to tenants, are serviced by employees of the identical types described in this record.

In an effort to establish that the Arsenal Building is a manufacturing establishment, and not a service establishment, plaintiff has relied upon the decision of the Supreme

Court of Michigan in the case of *Barfoot* v. *White Star Line*, 170 Mich. 349. The case is not in point. There, plaintiff, who was injured while working in a building tenanted by a manufacturing concern, sued the owner of the building for damages. The cause of action rested upon a state statute imposing a duty upon the agent, owner or lessee of any "manufacturing establishment, etc." to install and maintain certain safety apparatus. The Court sustained recovery against the lessor stating the "manufacturing establishment" meant premises in or on which a manufacturing business is conducted.

Application of that statute to the Arsenal Building might mean that a tenant's premises would be a "manufacturing establishment", but would not in any way mean that other parts of the building not devoted to manufacture, but solely to the common utilities and the furnishing of service, would be considered to be a "manufacturing establishment". The premises with which this case is concerned are the unleased premises in the possession of the defendants, in which premises alone the employees of Arsenal Corporation carry on their work.

If State authorities are to be deemed important the case of *Commonwealth* v. *Arrot Mills Co.*, 145 Pa. 69, should be considered, for there it was held that a landlord was not engaged in manufacturing although it rented space to manufacturers and supplied steam and motive power to them.

To approach the problem from another viewpoint, let us assume, for illustration, that the Arsenal Building Corporation owns a factory building situated in a field in rural New Jersey, and leases the entire factory to a concern like Max Wiesen & Sons, one of the Arsenal Building Corporation tenants, so that Max Wiesen may manufacture ladies' garments for interstate commerce. Let us assume further that Arsenal Building Corporation employs one person to cut the grass on the grounds surrounding the

plant occupied by Max Wiesen. Such employee is obviously engaged in servicing within the meaning of the exemption. The same is also true as to other types of service performed in or about the care and operation of the building and its appurtenances. Included in this category would be the servicing of package chutes, elevators, elevator machinery, steam boilers, toilet facilities and the like, which are a part of the real property. It is unquestionably this state of affairs which the District Court had in mind when it said:

> "It seemed to me as the trial progressed that the government had, in its attempt to tie up the employees of the defendants with 'production of goods for commerce', proved beyond any peradventure that the defendants Arsenal Building Corporation and Spear & Company, Inc. as its agents were 'service establishments' all of whose servicing was in intrastate commerce and I so find" (R. 337).

Plaintiff has relied upon Interpretive Bulletin No. 6, issued by himself as an aid to the interpretation of the statute (R. 23). It should be noted that plaintiff administrator is not given the power of definition as to the terms of Section 13 (a) (2), as he is granted under Section 13 (a) (1) with respect to the terms there used.

Assuming, however, that the bulletin is to be considered, defendants submit that it brings the Arsenal Building clearly within the definition of a service establishment.

For example, the bulletin points out that service establishments ordinarily sell services or labor rather than goods. That such may be a fair and reasonable test is pointed out in the case of *Stucker v. Roselle*, 37 Fed. Supp. 864, at 867. It is clear that the Arsenal Building is not engaged in the sale of goods, for the term "goods" is defined in Section 2 (i) of the Act as meaning "goods * * * wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof * * *".

The sales of electricity, which involves none of the employees here under consideration, are clearly retail sales.

To take another illustration from Interpretive Bulletin No. 6, it is said that a service establishment is local in character, and renders service to the ultimate consumer for direct consumption. As has been pointed out heretofore, no establishment can be conceived to be more local in character than a parcel of real property subject as it largely is, to the law of the situs. Moreover, the services rendered by the employees of Arsenal Corporation, if not rendered solely to the real estate, as herein contended, are rendered to the ultimate consumer, whether it be the tenant or the invitees or licensees of the tenant. And finally, it is certain that the services are rendered for direct consumption, for one cannot imagine a situation wherein a trip upon an elevator in the Arsenal Building could ever be recalled, resold or reused for any purpose.

Interpretative Bulletin No. 6 also asserts that the services exempted are most usually performed to meet the personal needs of private consumers, and not to meet the needs of business concerns. It is submitted that this test is erroneous because it is apparent that a service station engaged in the washing of automobiles and trucks would, nevertheless, be a service establishment if it washed a fleet of trucks engaged in interstate commerce, nor would a filling station be any the less a service establishment because it sold gasoline, washed wind-shields and checked oil for that same fleet of trucks.

(See testimony of the Hon. Robert H. Jackson, at p. 28 of Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor on S. 2475 and H. R. 2700, 75th Congress, 1st Session (1937)).

Ostensibly, service means, in at least one aspect, that an article belonging to another, such as an automobile to be

washed, a pair of shoes to be shined and the like, is worked upon in such a manner as not to change the basic character of the article. The business or occupation of removing a dress from the 20th floor to the street level, creating, as it does, no change whatever in the essential identity of the dress must be classified as a service rendered to the owner of the dress. To carry the point one step further, a shoe repair establishment is admittedly a service establishment within the meaning of the exemption, and yet it is apparent that a pair of shoes with new soles and heels is to a large extent a basically different article than a pair of shoes with run-down heels and worn-out soles.

Finally, it cannot be said that the Congress, in using the terms "retail or service establishment" in Section 13 (a) (2) of the Act, intended merely to exempt those service establishments which are similar to retail establishments. The material referred to above in discussing legislative history, demonstrates that the Congress intended to exclude from the operation of the law the retail trades *and* small businesses, *and* the service trades (see pp. 29-31 above). Moreover, this point is reflected in the language of the Act, for retail employees are twice exempted, first if employed in a "local retailing capacity" (Section 13 (a) (1)), and second if employed in a "retail establishment" (Section 13 (a) (2)). In the case of a "service establishment", *all* employees are exempt without qualification or other specification (Section 13 (a) (2)). Unless this language employed by Congress is deemed to be surplusage, it seems indisputable that service establishments are to be considered upon the basis of their own characteristics, and not upon the basis of a fancied kinship to the retail trades.

Defendants' position, simply stated, is that the character of the occupations represented in the Arsenal Building is such that they can fairly and reasonably be classified only as service occupations performed either upon the real property itself or for the tenants and those associated

with them, and are not occupations which can be identified with the production of any particular goods for commerce, or which can be called necessary for production, as distinguished from these necessary for the enterprise as a whole.

This Court, we believe, may take judicial notice of the fact that no industry committee has been appointed under appropriate sections of the Act for the Real Estate Industry, or any part of that industry, although it is the mandatory duty of the Administrator to make such a move as to industries covered by the Act. It is nowhere asserted that plaintiff is even considering such a step. This fact demonstrates that the Administrator in the exercise of his duties under the law does not consider the industry to be covered.

It must be concluded, therefore, that the servicing shown in this record is exclusively local and intrastate in nature, within the judgment of the administrator, within the express terms of Section 13 (a) (2) of the Act, and within the zone of activity which the Congress has declined to enter.

POINT V.

The Act applies only to employees of employers engaged in commerce or the production of goods for commerce, and then only to such of said employees as are themselves engaged in commerce or the production of goods for commerce.

This point was urged on the Circuit Court in *haec verbis*, and in substance means that the coverage of the Act calls for the dual test that both *employer* and *employee* must have the required relationship to interstate commerce. With this premise, it was argued in the Circuit Court that the Act had no application here because neither the Arsenal Building Corporation nor Spear and Company were en-

gaged in interstate commerce, or the production of goods for interstate commerce. Apparently, the Circuit Court met this point by finding in effect that an employer "like the defendant" was "engaged in the production of goods for commerce" (R. 347). That seems to be an acceptance of our Point V. The Court then proceeded to a discussion which deals with matters that were never in the mind of counsel for defendants. From the point of view of defendants, the Circuit Court thus set up a man of straw and knocked him down (R. 347).

A.

Our contention is that the defendants are not engaged in producing goods for commerce and therefor the Act does not apply. The Circuit Court holding that the defendants are engaged in producing goods is so contrary to all concepts and facts heretofore entering the minds of lawyers or laymen that we do not undertake further to combat it.

Our contention that the Act does not apply unless the employer himself is engaged in commerce, or the production of goods for commerce, is based on the specific words of Sections 5 and 8, dealing with "Industry Committees" as well as upon the general structure and purpose of the Act.

There are two ways in which wages may be fixed under the Act: (1) the automatic operation of the Act under Section 6, and (2) the more flexible arrangements through consultation with "Industry Committees," as provided in Sections 5 and 8.

Section 5 provides for the appointment by the Administrator of a "industry committee for each industry engaged in commerce or the production of goods for commerce."

Section 8 provides machinery whereby said committees, acting with the Administrator, may accelerate the standard of 40¢ per hour, or at the end of seven years may retard

the adoption of the standard of 40¢ per hour, by providing for lower rates not less than 30¢ per hour, thus importing flexibility into the wage provisions of the Act. At the same time, it should be noted that such activities of the Committee are limited to "each industry engaged in commerce, or in the production of goods for commerce," and to "employers engaged in commerce or in the production of goods for commerce."

Turning now to Section 6, we find that its mandatory provisions apply without discrimination to the minimum wages fixed by either of the two methods. Therefore, when Section 6 refers to "every employer" without qualification, it seems clear to us that it means employers engaged in commerce, or the production of goods for commerce. We certainly cannot ignore the use of the express qualifying words as they appear in Sections 5 and 8, but it is not doing violence to the purpose of the Act to assume that the omission of the qualifying words in Section 6 dealing with wages, and Section 7 dealing with hours, was not deliberate, for the purpose of extending the Act in some of its features to employers not related to commerce. On the other hand, it would do violence to the entire structure of the Act to assume that the minimum wages fixed after consultation with "industry committees" applied only to employers having the specified connection with commerce, while the minimum wages, automatically taking effect without consultation with such committees, applied to employers who had no connection with commerce, or the production of goods therefor. The fact that Section 6 deals identically with minimum wages arrived at by either of the methods in question shows that no such discrimination was intended. Subdivision 3 of Section 6(a) prescribes the minimum rate after the seventh year of the Act by requiring the employer to pay either the automatic wage of 40¢ per hour, or the rate not less than 30¢ per hour prescribed by the Administrator under Section 8, after consultation with the Industry Committee. Thus, the employer, after the ex-

piration of seven years, has the right to pay the wage fixed under Section 8, even though it is lower than the automatic rate of 40¢. But if the employer were not in an "industry engaged in commerce, or the production of goods for commerce," within the meaning of Sections 5 and 8, there would be no alternative rate, all of which shows the absurdity of claiming that the words "every employer" extend beyond employers having the specified relation to commerce. Subdivision 4 of Section 6 (a) involves the same problem in dealing with the mandatory minimum wages to be in effect for the period preceding the expiration of seven years after the enactment of the law. Under this subdivision, the 40¢ rate may be adopted through consultation with an industry committee at an earlier date than is otherwise prescribed in Section 6, but in the absence of such arrangements through the industry committees, the automatic step-ups of the minimum wage, as prescribed in Section 6, take effect.

In view of the way in which those provisions are interwoven, it seems clear that the statute at all times intended that the group of employers to be covered remain the same, and did not contemplate that employers not having the prescribed relationship to interstate commerce would be subject to the automatic provisions of the Act, while those who did occupy the prescribed relationship to interstate commerec might be subjected to other standards through consultation with industry committees.

If our argument in this respect is sound, it also follows that Section 7, which deals with maximum hours, also intended to cover only the employers engaged in interstate commerce, or in the production of goods therefor, notwithstanding the fact that it uses the unqualified words "no employer." This is further borne out by examination of the provision of Section 7(b) which refers to actions of the National Labor Relations Board. If the provision were intended to apply to all employers, the language might

well have included State Labor Relations Boards under whose jurisdiction employers not related to commerce might come.

This Court, in referring to Sections 5 and 8 of the Act, has said:

> "The Act also sets up an administrative procedure whereby those standards may from time to time be modified generally as to industries subject to the Act or within an industry in accordance with specified standards, by an administrator acting in collaboration with 'Industry Committees' appointed by him."
>
> *United States* v. *Darby Lumber Company*, 312 U. S. 100, at p. 110.

We submit that this language means that all industries subject to the Act are also subject to the provisions dealing with "industry committees," and that, therefore, the descriptions of the type of employers covered by this Act are to be found in Sections 5 and 8, dealing with industry committees. From this, it follows that only employers engaged in commerce, or the production of goods for commerce, are covered by the Act.

We further submit that this entire argument is borne out by the general purpose and structure of the Act.

Section 2 of the Act sets forth in a general way the economic theory which underlies the purpose of the Act. It was felt that certain labor standards in the production of goods could not be maintained against substandard employment conditions in the production of goods, if goods produced under substandard conditions were allowed to compete in the markets of the nation with goods produced under higher employment standards.

> *United States* v. *Darby Lumber Company*, 312 U. S. 100.

Section 2, therefore, refers only to "*industries engaged in commerce, or in the production of goods for commerce*".

It finds the fact that substandard conditions of employment in such industries were able, through the instrumentality of interstate commerce, to perpetuate such unfair conditions through unfair methods of competition which interfered with fair marketing of goods; and that such substandard conditions burdened commerce and led to labor disputes obstructing commerce.

In the face of this Section, and despite the emphasis placed upon it by this Court, in the *Darby* case, plaintiff withdrew paragraph 9 of the complaint in this case covering this point (R. 28), and offered no proof whatever that the activities of defendants interfered with or burdened commerce because of unfair methods of competition. Obviously the plaintiff found himself unable to meet the fundamental purpose of the Act.

In subdivision "b" of Section 3, commerce is defined as follows:

> "(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof."

Transportation is largely eliminated, because under Section 13 of the Act, railroads, water carriers, trolleys, buses, etc. are excepted. Moreover, under this definition, transportation is limited to transportation "among the several states or from any state to any place outside thereof", which, of course, excludes building service elevators.

Subdivision "j" of Section 3, through language of strict limitation, defines the conditions under which an employee shall be held to be engaged in production, for commerce.

These provisions indicate that the Act was intended to have no application to employers who were not engaged in commerce, or the production of goods for commerce, even though they might have an isolated employee or two who occasionally was engaged in commerce, or the pro-

duction of goods for commerce. This argument is further strengthened by the provisions of subdivision "c" of Section 11, which requires the preservation of elaborate records relative to *all* persons employed by "every employer subject to any provision of this Act". Surely, Congress is not presumed to have intended to extend this burdensome requirement to all employees of an employer, who, by and large, was not engaged in interstate commerce, even though one of his employees might be so engaged.

All these provisions give force to the argument that Congress, by the use of the words "every employer" in Section 6, and the use of the words "no employer" in Section 7 meant to include only employers in industries "engaged in commerce or in the production of goods for commerce".

Farr v. *Smith Detective Agency and Nightwatch Service, Inc.*, 38 Fed. Supp. 105;
Baggett v. *Henry Fischer Packing Company*, 37 Fed. Supp. 670.

In the case of *Killingbeck* v. *Garment Center Capitol, Inc.*, 259 App. Div. 691, the Court, in a unanimous opinion, held that employees, like a watchman or maintenance carpenter, are not covered by the Act when employed by some one other than the producer for interstate commerce. Section 15(b) of the Act, which provides that employment in a factory within ninety days prior to the removal of the goods in question shall be prima facie proof that the employee was engaged in the production thereof, mentions only employees employed directly by the producing company.

We repeat that since the words "affecting commerce" were removed from the Act and since as stated in *Federal Trade Commission* v. *Bunte Brothers Inc.*, 372 U. S. 349, this Court will not infer any intention on the part of Congress to deal with intrastate matters the reasonable conclusion is to limit the application of the Act as above set forth.

We think, also, that the legislative history of the Act, discussed by the Circuit Court, proves just the opposite of what is claimed by the Circuit Court. It shows that the change effected by the Conference Committee of Congress was merely to avoid covering employees who were not actually engaged in the production of goods for commerce, and there is no indication of an intention to so change the bills as to include employers not themselves engaged in producing goods for commerce.

Indeed, as pointed out by the Hon. ROBERT H. JACKSON, there would be grave danger of the law being held unconstitutional if it were not for the flexibility in standards of wages provided for by Sections 5 and 8.

> *Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor on S. 2475 and H. R. 2700, 75th Congress, 1st Session (1937)* p. 27.

The statement of the Circuit Court (R. 348) that Senator PEPPER stated "that the only test should be the occupation of the employees" is a positive inaccuracy (see PEPPER statement, *supra* p. 15). These remarks of the Senator did not enlarge the group of *employers* to which the Act applied but narrowed the group of *employees*.

Where, therefore, it appears that any activity is not involved in maintaining standards in interstate competition, it may fairly be presumed that Congress did not intend in the absence of such an exigency to violate the usual rule of local self-government. Referring to such a principle of interpretation, this Court, in the case of *U. S. v. American Trucking Associations*, 310 U. S. 534, said, at p. 543, concerning the interpretation of acts of Congress:

> "Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one plainly at variance with the policy of the legislation as a whole, this Court has followed that purpose rather than the literal words."

B.

Let us turn now to the next limitation. Even where the employer is subject to the Act, only those of his employees who are engaged in interstate commerce, or the production of goods therefor, are subject to the Act. This point is conceded by the Administrator, and is too clear to call for elaborate discussion, but the concrete contentions of the Administrator seem to be entirely inconsistent with its concession, since he has not as yet pointed to any class of employees of a concern engaged in interstate commerce which he concedes to be beyond the application of the Act. The defendants on the other hand contend that only those employees are covered whose services are directly identifiable with the production of some particular line of goods, part of which at least are intended for commerce.

Section 6, dealing with minimum wages, and Section 7, dealing with maximum hours, are expressly limited in their application to employees "engaged in commerce or the production of goods for commerce". Subdivision "b" of Section 15 provides as follows:

> "(b) For the purposes of subsection (a) (1) proof that any employee was employed in *any place of employment* where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment shall be prima facie evidence *that such employee was engaged in the production of such goods.*" (Italics supplied.)

Thus, the Act, by its express terms, clearly points to the requirement of distinguishing between employees of the same employer, who are covered and who are not covered and offers an opportunity to overcome the *prima facie* conclusion that a particular employee is engaged in the "production of goods for commerce". The test is whether the employee in question is definitely associated with the production of goods for commerce.

POINT VI.

If the Act were interpreted to apply to the employees of the Arsenal Building Corporation, it would be void for lack of Congressional power.

It is too well settled to require an extended citation of cases that Courts will avoid any construction of an Act which will lead to its downfall as being unconstitutional.

Missouri Pacific Railroad Co. v. *Boone*, 270 U. S. 466;
Schieffelin v. *Goldsmith*, 253 N. Y. 243;
Killingbeck v. *Garment Center Capitol, Inc.*, 259 A. D. 691.

Numerous decisions of this Court point to the conclusion that the occupations of building service employees, employed by landlords not engaged in trade, production or commerce, are beyond the reach of federal regulations.

Schechter Poultry Corporation v. *U. S.*, 295 U. S. 495.

The Court should not, therefore, by implication, expand the language of the Act in such a way as to raise grave doubts as to its validity, by reason of the doctrine set forth in the case above cited.

CONCLUSION.

It is therefore respectfully submitted, for the reasons above set forth, that the judgment of the Circuit Court should be reversed.

Respectfully submitted,

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April 6, 1942.

IN THE

Supreme Court of the United States

October Term, 1941
No. 924

ARSENAL BUILDING CORPORATION
AND SPEAR & CO. INC.,
Petitioners,

AGAINST

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

REPLY BRIEF FOR PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

ARSENAL BUILDING CORPORATION and SPEAR & CO. INC.,
Petitioners,
against
L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor,
Respondent.

No. 924

REPLY BRIEF FOR PETITIONERS.

I.

In the *Kirschbaum* case (1910), the Administrator lays much emphasis on the fact that the defendant furnished live steam of a particular quality for the operation of the machines of manufacturing tenants, and that without such steam the manufacturing machines would cease to function; that steam was also furnished to generate electricity not only to light the premises of the manufacturers but also to furnish motive power for parts of the machinery of tenants; and that the availability of this steam was a factor which led the manufacturers to locate their plants in the building (Administrator's brief, pp. 5-6, 16-7, 34-5); that two watchmen guarded deliveries and pick-up trucks

in the street and guarded the tenants' premises from loss by fire or theft or other sources; and that each morning the watchman turned on the heat required for the machinery of the manufacturers (Administrator's brief, p. 8). These facts do not appear in the *Arsenal* case.

In this same connection, it should be noted that in the *Arsenal* case the Circuit Court adopted an error in the Administrator's brief, which is still being repeated in its present brief, to the effect that the Arsenal Building furnished hot water necessary to the manufacturing operations (Administrator's Arsenal brief, p. 5). The Arsenal Building furnished water for the building purposes, and for the use of the tenants in their businesses, but there is no evidence that it furnished hot water for production.

Whatever may be our convictions as to the law which should be applied to these cases, it is entirely conceivable that in the application of the Fair Labor Standards Act, such differences might assume importance.

Let it also be stated that the defendants in the *Arsenal* case at no time have claimed that an employee must handle or work on goods or do preparatory work therefor before he can be found to be "*producing*" within the meaning of the Act. So far as the instant case is concerned the administrator in so arguing sets up a man of straw. For instance an operator of a crane in the factory would be producing within the meaning of the Act.

II.

The argument urged by the Administrator is that Congress intended by inference to take from the states to a large extent the field of management of real estate. As thus stated, this is peculiarly a case where the consequences and limits to be imposed by the interpretation and application of this statute must be considered and weighed and various questions must be answered before an intel-

ligent conclusion can be reached. How startling a proposal are we trying to lay on the shoulders of mere inference? What will be the effect of such a proposal on the distribution of sovereign powers? Taking into account the preponderant public opinion of our time, is it fairly inferable that Congress intended to have the Federal Government invade the field of the management of real estate? Any contention or argument which evades these questions—despite the repeated challenges of petitioners—by persistently ignoring the ultimate destination of any line of judicial reasoning which is being urged, cannot be regarded as constructive or helpful. Furthermore, we submit that lawyers who have devoted a substantial amount of time to the intensive study of this case owe it to this Court to at least suggest the significance of what this means and the possible point at which they would limit the extension of federal power under this Act. The decisions of the Circuit Courts in the *Kirschbaum* and *Arsenal* cases, and the Administrator's brief, fail pretty completely to meet this test. The petitioners have argued that if the Court goes so far as to sustain the Administrator's contention, there is no basis left for judicial demarcation in the future that will stop short of fantastic consequences. But that argument is left unanswered, or is referred to in the Circuit Court as mere "dialectical niceties." Is it "dialectical niceties" to look before you leap? If one is seeking to cross a stream without wetting one's feet, one does not necessarily jump to the nearest stone without taking into account the difficulties of the second jump.

Starting with the Administrator's premise that it is immaterial whether the immediate employer or employees are engaged in interstate commerce so long as they directly or indirectly contribute services or materials which are ultimately appropriated by some primary manufacturer engaged in producing goods for interstate commerce, we find ourselves unable to stop short of the grower, the miner,

the clothes presser or the restaurant keeper, who, while engaged in a strictly *local business*, either produce raw materials which ultimately find their way into the hands of the primary manufacturer, or serve or feed the employees of such a primary manufacturer. Furthermore, according to the Administrator's brief, if the cotton-grower or the restaurant keeper serve the interstate enterprise only in a slight degree, so long as it is not *de minimis* (Administrator's brief, p. 35), Congress is presumed to have intended to swallow them in the yawning gulf of Federal control. In this connection the Administrator seems to forget the *de minimis* doctrine by claiming in effect that the nature of the services of one of many employees may throw the whole establishment under the Act. Absurd as these cumulative conclusions may sound, we ask this Court to search the two opinions in the Circuit Courts, and the brief of the Administrator for any substantial help as to where the line of demarcation should be drawn short of all this, or any suggestion as to what enterprises would be excluded from the ambit of the Act if the Administrator's contentions were sustained. This very lack of any adequate suggestion along this line, either in the opinions of the Circuit Courts, or in the Administrator's brief, is at least some evidence that they either do not know the ultimates of the arguments they are urging, or that they know them and for some reason are disinclined to state them.

The pronunciamento issued by the Wage and Hour Division under date of April 20, 1942—which it will be remembered is but the first step of invasion of state rights by the Administrator under the principles laid down by the decisions of the Circuit Courts in these cases—is simply suggestive of the almost illimitable encroachment on certain types of states rights which will follow if the philosophy of the "house that Jack built" continues to be applied. We attach, as an appendix hereto, a copy of that pronunciamento.

Page 15 of the Administrator's brief calls attention to the fact that in defining the word "produced", Section 3.J of the Bill first contained the words "or in the making of tools and dies used in the production of such goods in any state," but that such words were ultimately displaced by the present wording of that section which closes with the phrase "or in any process of occupation necessary to the production thereof in any state." The Administrator argues that "the obvious purpose of this substitution was considerably to broaden the coverage of the Act by permitting the courts in the light of the facts of particular cases to determine which activities are necessary to production" (Administrator's brief, pp. 37-38). In other words, the Administrator contends that the only remaining test to the coverage of the Act as applied to production is whether the services or goods involved are "necessary" to the conduct of the work of the primary manufacturer who is engaged in producing for interstate commerce, and that the word "necessary", means anything which facilitates production. That contention, corroborated by the recent pronunciamento of the Administrator, bears out all that we have contended as to the extremes to which the arguments of the respondent carry us. Inevitably, there is no ambit or circumference to the coverage of this Act to which he can point, except where the service rendered, or the article produced, can be allocated exclusively to intrastate production and never ultimately reaches production for interstate commerce, and then only is it excluded if the employer is devoted exclusively to intrastate production or service. Even certified accountants, public stenographers and restaurants are in most cases covered.

Our contention as to the amendment of Section 3.J of the Bill—where the words "making of tools and dies used in the production" gave way to the words "necessary to

the production"—is that the intention was to eliminate any effort to include a manufacturer who merely sold to the primary producer, and to confine the application of the Act to those employees actually employed by the primary producer as a necessary part of his production of goods for interstate commerce.

III.

The Administrator's argument fails to give any weight to the major part of the definition of the word "produced" found in Section 3 J. If the closing words "process or occupation" necessary to production means everything contended for them by the Administrator, the major part of this entire section becomes surplusage and meaningless and the section might well be abbreviated:

> "Produced means any process or occupation necessary to production."

In fact the Administrator in his brief performs just that surgical operation on Section 3 J (Admr. Brief, p. 10).

If the section were so abbreviated, the petitioner would find it difficult to argue so cogently as to the real meaning of the intent of Congress. But Congress did not leave the courts in the dark on this point but specifically and explicitly enumerated the general character and quality of the acts which it intended to include within the definition of the word "produced". Then having been so explicit, and in order to fill in any gaps which might lie within the ambit of the definition as already set forth, Congress proceeded to use some general language which, in effect, meant "etc.". These closing words must be interpreted in the light of *ejusdem generis*. In other words, this closing phrase must be interpreted to mean something equivalent to

handling, working upon, or processing, goods, and this phrase must be limited to acts which are normally and directly connected with the production process within the particular producing enterprise. The closing generality was not adopted to enlarge the general area of application but merely to make doubly sure that everything within the area was covered.

IV.

The Administrator states in his brief that "Congress defined 'commerce' and 'produced' in the most sweeping terms". We submit that such a statement has no basis in fact. Congress defined the word "commerce" in a restrictive way, and in line with the decisions of this Court in respect to like definitions which theretofore had given a restrictive interpretation to the words "commerce" or "interstate commerce" (See our main brief, Point III).

As to the word "produced", it is clear that Congress did not intend to give it an application as broad as the National Labor Relations Act, because, in the course of the legislative history, the words "affecting commerce", as applied to production, were removed. The definition of the word "produced" in Section 3.J is specific and restrictive and relates everything to the physical act of producing whether it be the handling of the goods, or the performance of some other process or occupation of production. All services which do not involve the actual transporting or handling of the goods, or the performance of other activities immediately incident to the production, are excluded. Activities "affecting production" not being included and a specific enumeration of activities directly involved in production having been enumerated, it can hardly be said

that Congress has indulged "in the most sweeping terms" in using the word "produced".

Again, we submit that the Circuit Court erred and the judgment should be reversed.

Respectfully submitted,

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April 27, 1942.

APPENDIX.

Release of Wage and Hour Division dated April 20, 1942.

In the light of the Kirschbaum and Arsenal company decisions, it is the position of the Wage and Hour Division that the Act is applicable to employees engaged in producing fuel, power, or other goods or facilities for use or consumption entirely within the State by essential instrumentalities of interstate commerce, when such use or consumption aids or facilitates the interstate activities performed by means of such instrumentalities. Thus, for example, the Act is applicable to employees engaged in producing electric energy, steam, fuel or water for use within the State by railway terminals or depots, telephone exchanges, radio broadcasting stations, etc. The activities of such employees directly facilitate, aid, and contribute to interstate transportation, transmission, and communication, as a result of which such employees in our opinion are themselves properly to be deemed "engaged in commerce."

There are cases, moreover, where employees producing goods for use entirely with the State of production can be said to be engaged in a 'process or occupation necessary to the production' of other goods which move out of the State of production and are, therefore, subject to the Act. It is our opinion, for example, that the Act applies to employees engaged in producing fuel, power or water, which are used or consumed entirely within the State in the production of other goods for interstate commerce, and in accordance with this principle, the Act is applicable typically to employees engaged in producing power or water, all of which is locally consumed, but some of which is sold to local manufacturers and consumed by them within the State in the production of other goods for interstate commerce.

No. 924

In the Supreme Court of the United States

OCTOBER TERM, 1941

ARSENAL BUILDING CORPORATION AND SPEAR & CO., INC., PETITIONERS

v.

PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

In the Supreme Court of the United States

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ARSENAL BUILDING CORPORATION AND SPEAR & CO., INC., PETITIONERS

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PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

This case raises substantially the same problems as are presented by *A. B. Kirschbaum Company* v. *Fleming*, No. 910, petition for certiorari pending. For the reasons set forth in the Government's memorandum filed in that case, we do not oppose granting of the petition for certiorari in the present case.

CHARLES FAHY,
Solicitor General.

WARNER W. GARDNER,
Solicitor, Department of Labor.

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U. S. GOVERNMENT PRINTING OFFICE: 1942

No. 924

In the Supreme Court of the United States

OCTOBER TERM, 1941

ARSENAL BUILDING CORPORATION AND SPEAR & CO., INC., PETITIONERS

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

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ARSENAL BUILDING CORPORATION AND SPEAR & CO., INC., PETITIONERS

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L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the District Court (R. 330–338) is reported in 38 F. Supp. 207. The opinion of the Circuit Court of Appeals (R. 343–349) is reported in 125 F. (2d) 278.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 15, 1942 (R. 349). The petition for a writ of certiorari was filed Febru-

ary 5, 1942, and granted March 2, 1942 (R. 350). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Petitioners' employees covered by the injunction below are engaged in activities necessary to the operation and maintenance of a loft building in which large quantities of goods are produced for interstate commerce. The primary question presented is whether the employees are "engaged in * * * the production of goods for commerce" within the meaning of Section 7 of the Fair Labor Standards Act because they are engaged in a "process or occupation necessary to the production" within the meaning of Section 3 (j) of the Act.

2. Six of the employees are the starter and operators of freight elevators who transport goods arriving from other states or consigned to destinations in other states to and from the various lofts in the building. Are such employees also "engaged in commerce" within the meaning of Section 7 of the Act?

3. Are the employees here involved "engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce" within the meaning of Section 13 (a) (2), which exempts such employees from Section 7?

4. Does the Fair Labor Standards Act, as applied to the employees here involved, constitute a valid exercise of the commerce power?

STATUTE INVOLVED

The statute involved is the Fair Labor Standards Act, 52 Stat. 1060, 29 U. S. C. § 201 *et seq.* Copies of the Act will be furnished to the Court upon the oral argument.

STATEMENT

On March 31, 1941 (R. 1), the Administrator filed in the district court an amended complaint against petitioners alleging that they owned and operated a loft building devoted to the manufacture of goods for interstate commerce and that certain of petitioners' employees, by reason of the relationship of their work to the manufacturing activities conducted in the building, were "engaged in commerce or in the production of goods for commerce" within the meaning of the Act.[1] Charging that such employees had not been paid the overtime compensation required by Section 7, the amended complaint sought an injunction to restrain further violations of the Act (R. 2–5). In their answer, petitioners admitted that they had not complied with Section 7 but denied that any of their employ-

[1] The complaint did not allege violations with respect to petitioners' rental agents, rent collectors, bookkeepers, and similar employees engaged in carrying on the fiscal aspects of petitioners' business.

ees were subject to the Act (R. 6–9).[2] At the suggestion of the District Court following the trial, petitioners amended their answer to allege as an affirmative defense that Section 7 did not apply to their employees by reason of the "service establishment" exemption in Section 13 (a) (2) (R. 253–254, 331–332).

Petitioners own and operate[3] a twenty-two story manufacturing building in the heart of the New York City garment manufacturing district (R. 21, 30). Except for a few stores at the street level, the building is occupied by approximately 45 firms, more than 40 of which manufacture women's clothing for interstate commerce (R. 3, 9, 24, 316–318).[4] The value of the goods manufactured in the building amounts to more than $29,000,000 annually and of these goods more than 80 percent in value is shipped out of the state (R. 316–318).[5] The an-

[2] The answer alleged several other defenses, some of which were withdrawn or overruled at a pre-trial conference (R. 16, 17, 331) and others of which were dismissed or abandoned at the trial (R. 331). None of these defenses is relevant here.

[3] Arsenal Building Corporation owns the building; Spear & Co., Inc., is Arsenal's managing agent (R. 21, 183). Petitioners agreed at the trial that if the employees were covered by the Act, the injunction should run against both petitioners (R. 16).

[4] The few remaining concerns are engaged in the sale and shipment, in wholesale lots, of silks, rayons, and other materials to manufacturers, wholesalers, and contractors in other states (R. 3, 24).

[5] These figures reflect only the finished products moving out of the building and do not include the further shipment

nual pay roll of the some 2,000 workers employed by the manufacturers in the building totals over $3,250,000 (R. 316–318).

The employees of petitioners covered by the injunction below are two firemen, an electrician or mechanic, a starter and five operators of the freight elevators, a starter, assistant starter and six operators of the passenger elevators, two watchmen, five day porters and a night porter (R. 90–91). The firemen operate and care for the heating plant and boilers furnishing heat and hot water necessary to the manufacturing operations (R. 36, 127–129, 151, 164).[8] The mechanic or electrician wires the manufacturers' premises to accommodate machinery, makes electrical repairs, fixes leaks in the water system, maintains the elevator motors, equipment and signal system, maintains and repairs the switchboard controlling the electrical supply, repairs short circuits in the wiring system, replaces fuses and motor armatures, renews worn faucets, repairs broken pipes, and keeps all radiators in the building in working order (R. 30–37,

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of semifinished goods from the building to intermediate processors in other states or back to the manufacturers from the processors; frequently such processing requires several separate interstate shipments from and to the building before the product is finished (R. 158, 160–161, 316–318).

[8] Petitioners submeter electricity for light and power to the manufacturers (R. 164, 293, 300). The water needed in the manufacturing processes, for operation of the automatic fire sprinkler system, and for the sanitary facilities, is pumped to tanks on the roof and from there circulated throughout the building by a gravity and pressure system (R. 33–34).

46). While major repairs on the fire sprinkler system are performed by an outside contractor, the mechanic checks the tanks daily to see that they are kept at the appropriate pressure and have an adequate amount of water (R. 49). He also packs the valves to prevent or stop leaks which might otherwise damage the manufacturing premises or goods in them (R. 34–35, 50). In cold weather he takes measures against freezing of the sprinkler system (R. 49).

The building's four freight elevators carry to and from the manufacturing lofts the heavy volume of goods described above (R. 27, 48, 55, 62–63, 148, 158). The carriers to which the goods are entrusted for interstate transportation pick up and deliver the goods at the manufacturers' premises (R. 158, 161–162). The bulk and weight of the goods preclude their movement to and from their point of destination or departure except by elevator (R. 158, 159, 176). The traffic in merchandise in and out of the manufacturing plants in the building is constant and heavy (R. 118). Deliveries to and pick-ups from the various manufacturers in the building are made daily, and the freight elevators are in practically uninterrupted use during the business day (R. 161–162).

The five passenger elevators are indispensable to the transportation of the 2,000 manufacturing employees in the building to and from their places of

work. They are also essential to enable the employers and the constant flow of customers, buyers, truckmen and salesmen to reach the lofts on the upper floors (R. 63, 64, 68, 75, 150). These elevators likewise carry delivery men with parcel post and light packages to and from the manufacturers' premises (R. 131–132).

The building's night watchmen make regular rounds of the building to guard against fire and theft; during the summer, they also supervise the boilers during the firemen's off hours so as to assure an adequate supply of hot water for the manufacturers (R. 125–126). The building is kept clean and fit for occupancy by the porters; they sweep and wash the floors and stairs in the public portions of the building, keep the common toilets clean, and keep the halls clear of rubbish and trash. They also knock down walls and erect partitions in the manufacturers' plants, paint their floors and do numerous other jobs (R. 76–78, 95–96). They relieve the freight elevator operators daily (R. 77, 80).

The dependence of the manufacturing operations carried on in the building upon the work of these employees is graphically illustrated by proof in the record concerning a strike of maintenance employees in the New York City garment manufacturing area during February 1939. During the three days the strike lasted (R. 108) the flow of

goods into and out of the building here involved was drastically reduced and production virtually came to a halt. The stoppage of heat during cold weather made the building unfit for occupancy (R. 41, 108). Without elevator service the manufacturing employees could not reach their benches; those who braved long flights of stairs found a shortage of materials since incoming goods could not be delivered (R. 41, 108, 177). Shipments from the building into the channels of interstate commerce suffered an immediate and sharp decline (R. 166). On the day before the strike the Railway Express Agency took 1,260 shipments from the building; on the first day of the strike this figure fell to 759, on the second day to 469 and on the third day to 355 (R. 324). Since manufacturing was stopped by the strike, the shipments did not rise sharply after termination of the strike on February 4; it took more than a week for outgoing shipments to reach a normal level (R. 324). Inbound shipments did not experience a similar slow recovery; after dropping from 210 on the day before the strike to 20, 25, and 12 on the three strike days, such shipments rebounded to 140 on Saturday, February 4, and to 496 on Monday, February 6 (R. 323). Plainly, incoming shipments had accumulated in the hands of the carrier due to the impossibility of delivery during the strike.

Upon the basis of the foregoing facts, the District Court concluded that neither petitioners nor their employees are engaged in commerce or in the production of goods for commerce, and, further, that petitioners are service establishments entitled to the exemption provided by Section 13 (a) (2) of the Fair Labor Standards Act (R. 329–330). Judgment was accordingly entered dismissing the complaint (R. 338). The court below reversed (R. 349).

ARGUMENT

The facts and issues herein do not differ in any material respect from those in *A. B. Kirschbaum Company* v. *Walling*, No. 910, present Term, to be argued immediately preceding the instant case.[1] Our brief in No. 910 treats the issues fully and we accordingly refer the Court to that brief for the arguments in support of our position here.

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[1] In addition to advancing some of the arguments urged by petitioner in the *Kirschbaum* case, petitioners here suggest that the representation of their employees for collective bargaining purposes and any possible unfair labor practices are dealt with by the New York State Labor Relations Board rather than by the National Labor Relations Board (Brief, 32). This circumstance is immaterial to the question of federal power. *United States* v. *Darby Lumber Co.*, 312 U. S. 100, 114; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 222.

CONCLUSION

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

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